INDIVIDUAL LIBERTY AND THE LAW

Calcutta

EASTERN LAW HOUSE PRIVATE LTD
54 GANESH CHUNDER AVENUE
CALCUTTA 700 013

New Delhi

EASTERN LAW HOUSE PRIVATE LTD
4833/24 ANSARI ROAD, DARYAGANJ
NEW DELHI 110 002

New York

OCEANA PUBLICATIONS INC
DOBBS FERRY
NEW YORK 10522

UNIVERSITY OF CALCUTTA

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INDIVIDUAL LIBERTY AND THE LAW

TAGORE LAW LECTURES

By

SIR ZELMAN COWEN

C.M.G., Q.C., LL.M., (MELB.), M.A., D.C.L. (OXON.), LL.D. (HON.) (HONG KONG, QLD., MELB.), F.A.S.S.A., F.A.C.E.

Vice-Chancellor, University of Queensland

CALCUTTA

EASTERN LAW HOUSE

DOBBS FERRY, N.Y.

OCEANA PUBLICATIONS INC

1977

Distributed exclusively outside India by
Oceana Publications Inc, Dobbs Ferry, N.Y. 10522, U.S.A.

ISBN 0 379 00597 2

Published by B. C. De for Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 700 013, India and printed by B. B. Das for Orient Press, 123/1 Acharya Prafulla Chandra Road, Calcutta 700 006, India

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THE RIGHT TO SWING MY ARM

THE BOOK WHICH first kindled my interest in the law had its origin as the Tagore Law Lectures for 1926. In that year, the late Sir Carleton Allen delivered the lectures under the title of the *Sources of Law* and those subsequently appeared as the classic *Law in the Making*. At various times in my life, I have read the Tagore Lectures of distinguished legal scholars and in the preparation of this series, I have made frequent reference to the Tagore Lectures of Mr. Justice W.O. Douglas of the Supreme Court of the United States which were delivered in 1955 under the title of *From Marshall to Mukherjea: Studies in American and Indian Constitutional Law.*[1]

I suppose that it is a somewhat unusual disclosure, but I shall tell you that over many years I hoped that I might be invited to prepare and deliver this long-established and famous series of lectures. The strength of the chain might have been better secured had the invitation come to me at a time when I spent my daily life in the teaching and the study of the law. As it happens, I was invited some years after I had become a Vice-Chancellor, and the burdens of the administration of a large urban university afford a very limited opportunity for the study and reflection which their preparation properly demands. I chose, however, to accept the

1. W.O. Douglas: *From Marshall to Mukherjea: Studies in American and Indian Constitutional Law*, Tagore Lectures (1939) delivered July 1955 (Eastern Law House Private Ltd. 1956).

invitation and I have done my best to prepare and present lectures which are fitting. I am pleased and honoured to take my place in the list of the Tagore Law Professors.

The themes with which I shall be concerned in the lectures which follow are those of liberty within the law. It is my hope that they are timely, for we live at a time when questions relating to liberty are often overshadowed by those of survival. In India, over a long period, issues of survival have had a special urgency for very many.

Survival now is a matter of worldwide concern; speaking of the concerns of the Club of Rome, Ralf Dahrendorf in his *Reich Lectures* for 1974 said that the issues of survival tend to be exaggerated to the point of obliterating the overwhelming significance of justice and liberty.[2] Many have their doubts about the chances of liberty in a world of rising prices, falling incomes, a new distribution of power and impotence, threats of war and starvation, crime and disorder, and declining confidence in the capacity of those who govern or even the institutions of government.[3] A distinguished American university president has spoken of the difficulties and perplexities of our contemporary society and age. "I doubt", he says, "that anyone would be able to label our age, although it might be called the age of frustrated expectations, the age of protest against almost everything, the age of unlimited possibilities and disappointing results. It is an age that can put men on the moon, yet create an impossible traffic tangle in every metropolitan centre. It is an age of unbelievable wealth and widespread poverty. It is an age of sensitivity to human dignity and human progress, yet one in which there is relatively little of either, despite the available resources. It is finally an age when the hopes, the expectations and the promises of humanity have become more rhetorical than real... There is a wide gulf between the blueprint and the reality, the word and the deed. One is often reminded of

2. *The Listener* 14 November 1974 at p. 623.
3 ib. at p. 622.

Charles Dickens' opening statement in the *The Tale of Two Cities* : 'It was the worst of times ; it was the best of times... We can survive the worst if we can achieve the better or, hopefully, the best'."[4]

It is a time when questions are asked about the capacity of men, even within a single society, to communicate meaningfully with one another, and Lord Snow's well-known writings on the two cultures, the science and the non-science-based, give expression to one aspect of this. It is a time when the very existence of a common culture is questioned, when there is in Robert Oppenheimer's words, a thinning of common knowledge, a time when it is said that there is a retreat from the concept of mind, a disposition to abandon critical rationality. It is a time when authority is under spectacular challenge. The recent report of the Phillimore Committee on *Contempt of Court* in the United Kingdom spoke of a "wider tendency in recent years to challenge authority of all kinds, including that of the courts".[5] There has been a strong and insistent challenge to the authority of law. Mr. Edward Levi, the present Attorney-General of the United States, has said that whether we like it or not—and in varying degrees many do like it—we find ourselves in a period of instability, disruption and violence. The times question the idea of law and its administration. Law has not prevented the basic unrest and has not prevented the acceptance, popularity and frequent effectiveness of tactics of disorder. In society at large there is open dissent against authority, voiced not simply by criminals but by public figures. In the university the authority of teacher and constituted authority is battered, parental authority is questioned ; in the relationship of the sexes, male authority is under spectacular assault. The Church has faced a sharp and insistent challenge to its authority, government faces confrontation and opposition on a variety of issues, and

4. Hesburgh : *The Task of Universities in a Changing World* (Ed: Kertesz, Notre Dame Press 1971) at pp. 489-90, 494.
5. *Report of the Committee on Contempt of Court*, Cmd 5794 (UK) of 1974 at p. 5.

often responds uncertainly, quixotically and unevenly. Unions seeking to achieve political and social objectives employ the weapons of boycott and strike action in matters quite unrelated to their historic missions. We are witnessing, as Dahrendorf says, an assertion of autonomy which in this context means a dissociation on the part of those who make the claim from the legal norms which bind all citizens by defining a separate world of rules. It has turned out to be infectious and has led to a condition in which legitimate government can be nearly paralysed by a chaos of criss-crossing pressures by 'autonomous' groups.[6] There are clashes with police authority, not the clash of individual gunmen and gangs, but the clashes stemming from mass and not infrequently violent resistance of people protesting and demonstrating about a variety of political and social issues. Questions are asked abount the binding force of law; justifications for disobedience to law are readily formulated.[7] Whereas at an earlier time those who asserted the right to disobey at the same time accepted the penalty, seeing in both disobedience and acceptance of punishment a public demonstration of the case for re-examining the law, there is a contemporary doctrine which asserts the right to disobey free of any penalty. The binding force of the law in such cases is altogether repudiated; people lay claim to a right to act free of penalty and authoritative constraint. Another aspect of this is an attitude to gross breaches of the law which sees the violator as an innocent victim, perhaps, even more, as some sort of hero. No doubt such attitudes are reinforced by cynical and hypocritical attitudes to law on the part of governments and those placed highly within them. I shall later speak of more particular aspects of Watergate, but one of the damaging aspects of that lamentable business was the attitude to law it revealed. Among those who most loudly proclaimed the inexorable obligation to obey the law were public men deeply involved in the Watergate scandals. They

6. *The Listener* 21st November 1974 at 656.
7. See, *e.g.*, Kadish and Kadish, *Discretion to Disobey* : A Study of Lawful Departures from Legal Rules (Stanford 1973).

were shown to have no respect for, and readiness to, break the law when it stood in their way, while with their public faces, they vociferously proclaimed the obligation to obey it. As a former Attorney-General of the United States puts it, the values exhibited by Watergate were lawless, truthless and violent values that seek to seize power, to curb opposition, to have their own way. Mr. Levi, the present Attorney-General, has warned that "the failure of law to make good its assertion of sovereignty permitting unchallenged acts of violence weakens its sovereignty and the effects are long with us... in important ways the operations of our legal system have contributed to the basic unrest and to tactics of disorder".[8]

There are great problems and pressures and the legal order is under serious strain, and we have been aptly warned that coping with the immediate issues is a necessary condition of survival, but that it is no guarantee of survival in liberty.[9] A great challenge to all of us, not least lawyers, is to formulate the means by which we may survive in liberty. I do not propose to tackle that great question in its manifold aspects here; rather I am concerned to explore some aspects of the problems of liberty in some contemporary legal and political systems. What I seek to do is to explore the tensions, the balances struck and the appropriateness of propounded legal solutions in striking balances between competing claims. One of the great historic claims to liberty in democratic societies, and one given a special emphasis in contemporary debate is the claim to speak, to publish, to know and make known the claim to freedom of speech and of the Press and the media. As Lord Simon of Glaisdale put it in the House or Lords in the *Thalidomide* case[10]

8. Levi, *The Crisis in the Nature of Law* (Cardozo Lecture 1969) at pp. 22-23.
9. Dahrendorf, *The Listener* 2 January 1975 at p. 8.
10. *Attorney-General* v *Times Newspaper Ltd.* (1973) 3 All ER 54 at p. 77. See also *R* v *Savundrayagan* (1968) 3 All E.R. 439 at p. 441, *per* Salmon L.J. "There is no doubt that a free press has the right and indeed the duty to comment on such topics so as to bring them to the attention of the public. It is in the public

> "The first public interest involved is that of freedom of discussion in a democratic society. . People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism."

We have heard much of investigative journalism in recent times, particularly in the aftermath of Watergate. The activities of the Press have been hailed as major factors leading to the exposures of gross governmental malfunction.[11] It is certainly the case that investigative journalism, adverse to government, and particularly to the claims and disposition of government to conceal and too often to mislead, has become a feature of our contemporary life. It has been said that we have moved from co-operative to adversary journalism ; that is to say from a period in which the relations between the government and the press had a significant co-operative aspect, to one in which the press regards its proper role as independent of and often antagonistic to government. The role of the Press is defined as that of an autonomous, investigative adversary of government. Government's response has been to withdraw from co-operation and willing communication with the press, while for its part, as the antagonisms have built up, the Press has come to act in a way in which it would not have acted in an earlier though not far distant time. As one journalist put it "the progress of our arms, as in the case of the Pentagon Papers, is regarded by the Executive as something to conceal."[12] It has been said that the publication of the Petagon Papers,

interest that this should be done. Indeed it is sometimes largely because of facts discovered and brough to light by the Press that criminals are brought to justice."

11. Weaver: *The New Journalism and the Old. Thoughts After Watergate* (1974) 35 Public Interest 67.
12. Rembar: *The First Amendment on Trial: The Government, the Press and the Public* (1973) 231 Atlantic Monthly 45 at p. 48

divulged in breach of confidential employment to major national organs of the American Press, would not have taken place a decade earlier and that in the decade or so leading up to this event, the relations (in the United States) between media and the government had shifted markedly to a position of stand-off and hostility on both sides.[13] What is true of the United States is also more generally true; in a somewhat different context, the posture of the media in the United Kingdom the *Thalidomide* case in the early 1970's was one of challenge to legal constraints imposed in this case not by the government but by a settled *corpus* of law formulated to protect due process in trial procedures. As the Editor of the *Sunday Times* put it, "*Thalidomide* was the greatest drug tragedy of our time. Eight thousand children were born deformed because their mother took Thalidomide"[14] and the newspaper in 1972 resolved to take action to help the victims. In the immediate aftermath of the decision of the House of Lords in that case, which I shall discuss in some greater detail later in these lectures, the *Sunday Times* complained of the oppressiveness of the law and made a forceful demand for its radical reform. It was said that there was need to recognise that there were occasions on which there was greater benefit from free speech and publication than from preserving the legal cocoon intact from the outside world.[15] Of course it has not always gone this way; the excesses of media publicity in the aftermath of the assassination of President Kennedy in November 1963 were seen by the Warren Commission as "a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial".[16] For its part, the Press has insisted over a long period that the constraints imposed upon it particularly by defamation laws, by laws or proposed laws purporting to protect privacy, and

13. Weaver *op. cit.*
14. *The Thalidomide Children and the Law* (Deutsch 1973) at p. 8.
15. *ibid.* at pp. 149ff.
16. *Report of the Warren Commission on the Assassination of President Kennedy* (1964) at p. 242

by rules devised to safeguard trials against prejudicial publicity are grossly and unjustifiably restrictive. The Younger Committee in its *Report on Privacy in the United Kingdom* said that the Press laboured under a sense of grievance that the law of defamation was too burdensome and minatory[17] and there are many press statements which confirm this. In 1971, the Managing Editor of the *New York Times* declared that the ultimate decision on what it would print must rest with *The Times* in accord with responsible journalistic standards. As against this, it has to be seen that there are serious and substantial competing claims : to reputation, to privacy, to due process through the assurance of fair trial by duly constituted courts. More than eighty years ago, in a law review article of historic importance, Samuel Warren and Louis Brandeis complained of the contemporary situation in the United States, where it was said :

> "The Press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery... To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual, but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily agony."[18]

That was said in support of an argument for the recognition of a common law tort action to protect and assure the right to privacy, the right of withdrawal into private life. Forty

17. Cmd. 5012 of 1972 at p. 46
18. Warren nd Brandeis: *The Right to Privacy* (1890) 4 Harvard L.R. 193.

years on, a legal scholar observed, in the context of the law of defamation, that the power of the contemporary press to destroy the reputation of an individual was so great that strict rules were necessary to secure a balance.[19] In a recent case in the Supreme Court of the United States, *Gertz* v. *Robert Welch Inc.*[20], Justice White observed that "the case against razing State libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few".

In these lectures, as I have said, I seek to explore the contending claims to liberty : the claims of the media to freedom to publish, to know and to make known, and the countervailing claims to valued rights : to the protection of reputation and to privacy, to the assurance of due process to assure a fair trial uncontaminated by prejudicial publicity. I also propose to look briefly at those constraints on freedom of publication and on the rights of the individual to read, to see and to act which are imposed by obscenity laws.

The right to privacy goes far beyond a claim to be protected from the unjustifiable intrusions of the press and the other media. A rapidly developing technology, which makes it easily possible to exercise surveillance over the activities and conduct of individuals by the use and exploration of a variety of devices, has become a matter of increasing and anxious concern. Almost forty years after the publication of the Warren and Brandeis article, Brandeis, by this time a distinguished Judge of the Supreme Court of the United States, wrote, in *Olmstead* v *U.S.*,[21] a case which raised the issue of the admissibility of evidence obtained by eavesdropping (specifically by telephone tapping) against a man charged with crime. Brandeis, at the time in dissent, declared that it was not admissible. In a famous and prophetic passage he wrote :

"Discovery and invention have made it possible for the

19. Paton (1939) 33 Illinois L.R. at p. 670.
20. (1974) S. Ct. 2997 at p. 3038.
21. *Olmstead* v *U.S.* (1928) 277 U.S. 438 at p. 478

> Government by means far more effective than stretching upon the rack to obtain disclosure in court of what is whispered in the closet... The progress of science in furnishing the Government with means of espionage is not likely to stop wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which time it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexposed beliefs, thoughts and emotions. The makers of the Constitution ... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

In the course of time, Brandeis' view, expressed in *Olmstead* in dissent, became the law. And by legislation in many jurisdictions and in many countries, the use of a variety of technological devices and instruments which allow of surveillance over human life and activity has been regulated and controlled. Brandeis spoke of surveillance by *government*, which has special dangers and which, employed comprehensively, takes us relentlessly to 1984. Such devices of course are not only available to, and have not been used exclusively by, governmental instrumentalities. They are part of the armoury of an army of snoopers. As one contemporary writer in this field has put it :

> "The accelerating development of technology and the almost exponential expansion of the ability to manipulate personal information in variegated ways may be altering the balance between the individual citizen and those institutions in society that seek to exercise control over him. The individual has little ability to protect himself against governmental and private snoopers who can employ sophisticated electronic surveillance to monitor

his activities and to obtain information about him. More substantial legal safeguards than those currently available are required merely to maintain the *status quo* in the privacy field."[22]

Computer technology makes a special and formidable contribution to the problem. The capacity of the computer to assimilate and store and print out a mass of information provides the possibility of comprehensive surveillance by dossier over individuals, with an ease and to an extent never before comprehended. Whatever the present dimensions of the threat, the possibilities of far-reaching surveillance are very real.

From the early years of this century, courts, legislatures and scholars in the United States have been actively concerned with issues of privacy. The earliest statutory provision was enacted in New York State and provided criminal and civil remedies for the use without written consent of the name or image of a person for the purposes of advertising or trade. This was protection within a narrow compass, and the Warren and Brandeis article encouraged judicial development of a more general tort remedy for the protection of privacy. It has been said, on the one hand, that a fairly well-balanced compromise has been achieved by broadly adopting generally accepted community standards of civilized conduct as the criterion for prescribing the scope of legal protection[23]; on the other, that notwithstanding the undoubted values enshrined in the claim to privacy, it lacks a legal profile.[24]

The United States has given leadership in the common law world in exploring the complex issues involved in the protection of privacy. Within the last two or three years commi-

22. Miller, *Computers and Privacy* (1969) 67 Michigan L.R. 1091 at pp. 1176-7
23. Fleming: *The Law of Torts* (4th ed. 1971) at p. 569.
24. Kalven : *Privacy in Tort Law—Were Warren and Bradeis Wrong* (1966) Law and Contempt. Problems 326; See also Dworkin: *The Common Law Protection of Privacy* (1970) 19 Tasmania *L.R. at p.* 436.

ttees in the United Kingdom have made substantial reports on privacy,[25] on contempt of court, bearing, *inter alia*, on issues of publicity and fair trial,[26] and on defamation.[27] Over the past decade and a half, private members' bills have been introduced into the United Kingdom Parliament to deal with various aspects of privacy, starting with Lord Mancroft's *Right of Privacy Bill of 1961* which attracted distinguished and thoughtful participation in the debate in the House of Lords and which purported to give a right of action to an individual for unauthorized publication in the mass media of words "relating to his personal affairs or conduct if such publication is calculated to cause him distress or embarrassment." During the 'sixties', other bills introduced in the United Kingdom Parliament dealt with various aspects of the matter: with industrial espionage, with computer data banks, with electronic surveillance and with privacy generally. The comprehensive Walden Bill of 1969 was inspired by the report and proposals of a Committee of *Justice*, the United Kingdom section of the International Commission of Jurists, and the Walden Bill in turn led the United Kingdom government to appoint the Younger Committee whose substantial report on privacy appeared in 1972. In Canada broadly framed acts dealing with privacy issues have been enacted in British Columbia and Manitoba.[28] In Australia, there has been considerable activity in the areas of defamation and privacy. In the State of New South Wales a very substantial report of the Law Reform Commission on Defamation was submitted in 1971. The terms of reference of the Commission were to "enquire into the extent to which the law and the practices of

25. *'Report of the Committee on Privacy*, Cmd. 5012 of 1972 (Younger Report).
26. *'Report of the Committee on Contempt of Court*, Cmd. 5794 of 1974.
27. *Report of the Committee on Defamation*, Cmd. 5909 of 1975 (Faulks Report).
28. Privacy Act 1968 (B.C.); Privacy Act 1970 (Manitoba) See Story: *Infringement of Privacy and its Remedies* (1973) 47 Australian L.J. 498 at pp. 506-7.

the courts as at present existing in respect of contempt, libel and similar legislation hamper the press in publishing facts of public interest and in editorially commenting thereon within the limit of what is necessary for the protection of the liberty of the subject and the security of the State." The Commission produced a detailed and impressive working paper followed by a report on defamation in 1971 and this has been translated into legislation by the *Defamation Act 1974*.

There has also been growing and active concern with problems of privacy in Australia. Legislation in two States in the later 1960's dealt with surveillance devices. In 1969 I gave the Boyer Lectures for the Australian Broadcasting Commission on *The Private Man* and these canvassed in comparatively short and general compass a wide variety of issues bearing on privacy. In published form, they attracted wide attention. In 1971 legislation was enacted in Queensland which tackled a variety of privacy issues including credit reporting and data banks; in South Australia in 1972, legislation dealt with surveillance devices and more recently there has been extensive and acrimonious debate on proposed legislation in South Australia and Tasmania designed to provide more comprehensive protection for privacy. One of the most significant and comprehensive surveys of the privacy issue in Australia has been the *Report on the Reform of the Law Concerning Privacy* by Professor W.L. Morison which was commissioned by the Conference of Attorneys-General of the Commonwealth and the Australian States and was published in 1973.[29] This very able study canvassed many issues and aspects of privacy and it critically examined the recommendations of the Younger Committeee published in the United Kingdom in the previous year. Recommendations in the Morison report have been translated into law in New South Wales.[30] In the juristic literature there has been a burgeoning interest in privacy in recent years.[31]

29. Parliamentary Paper No. 85 of 1973 (Commonwealth of Australia)
30. Privacy Act, 1975

The issues with which we shall be concerned in these lectures have given rise to major cases. In the United Kngdom, the *Thalidomide Case*[32] which was fully debated successively in the Divisional Court, the Court of Appeal and the House of Lords, provided in the words of the Editor of the *Sunday Times*, the defendant newspaper, the focus for a classical judicial debate on the limits of a free press[33] within the context of due process and fair trial. It is generally agreed that one of the major and far-reaching decisions of the Supreme Court of the United States in recent years was the decision in *New York Times* v *Sullivan* where the Court expressly held that the Constitution of the United States, by application and interpretation of the First Amendment, denied an action for libel at the suit of a public official against a newspaper in the absence of a finding of express malice or recklessness on the part of the defendant. As Brennan J. said: "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[34] Three judges would have gone further, and would have denied absolutely any right to bring a libel action in such cases, whether or not malice or recklessness could be established. The *Sullivan* case represented a major departure from earlier doctrine; it had long been assumed that the first amendment could accommodate liability for defamation[35] on common law terms. I shall explore the working out of

31. Storey: *Infringement of Privacy and Its Remedies* (1973) 47 Australian L.J. 498 at p. 515

32. *A. G.* v *Times Newspapers Ltd.* (1972) 3 All E.R. 1136; [1973] 1 All E.R. 815; [1973] 3 All E.R. 54

33. *The Thalidomide Children and the Law* (1973).

34. (1964) 376 U.S. 254 at p. 270.

35. See, *e.g., Beauharnais* v *Illinois*, (1952) 343 U.S. 250. See Pedrick: *Freedom of the Press and the Law of Libel : The Modern Revised Translation*, (1964) 49 Cornell L.J. 581.

the *Sullivan* doctrine in its application to public officials, to public persons and to public issues in a later lecture. The case had a somewhat unexpected and questionable application in the neighbouring area of privacy, when in *Time Inc.* v. *Hill*[36] the Supreme Court held that there was a first amendment constitutional objection to an action for privacy brought by plaintiffs whose deeply disturbing experiences a few years earlier were revived in a magazine article. While the doctrine of this case is restrictive of the development of doctrines of privacy, the Supreme Court has in other cases invoked a somewhat unusual constitutional principle of privacy as the basis for invalidating State laws prohibiting the sale of contraceptives,[37] the possession in a private house of pornographic materials[38] and State laws prohibiting abortion.[39]

Such cases as the *Thalidomide Case*, where in the words of Lord Reid in the House of Lords, "public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice",[40] and *Jones* v *Skelton*,[41] where in the context of a defamation action, the Privy Council declared that the law seeks to balance the defence of reputation on the one hand and the defence of free speech and expression on the other, illustrate the approach of English law to the problems with which we are here concerned. The problems are approached from the standpoint of competing claims and interests, sometimes clearly formulated, sometimes not. In the United Kingdom, unlike the United States, these questions do not raise constitutional issues. In his celebrated *Law of the Constitution*,[42] Dicey pointed out that in English law there was an absence of those

36. (1967) 385 U.S. 374.
37. *Griswold* v *Connecticut* (1965) 381 U.S. 436.
38. *Stanley v Georgia* (1969) 394 U.S. 557.
39. *Roe* v *Wade* (1973) 409 U.S. 817.
40. [1973] 3 All E.R. 54 at p. 60.
41. (1963) 1 W.L.R. 1362.
42. (7th ed. 1908) at p. 198.

declarations or definitions of rights so dear to foreign constitutionalists. Freedom from arbitrary arrest, the right to express one's opinion on all matters subject to the liability to pay compensation for libel or to suffer punishment for seditious or blasphemous statements, the right to enjoy one's own property, all rested, in Dicey's view, upon the same basis, namely, the general law of the land. To say that the Constitution guaranteed one class of rights more than the other was, to an Englishman, an unnatural form of speech. A man might write and publish what he pleased, but if he made a bad use of this liberty he must be punished. The conclusion, Dicey pointed out, was that there was no special law of the press; the law of the press, in English law, was merely part of the law of libel. Such remains the formulation of English law: in the context of the power to impose penalties for contempt of court, the Phillimore Committee said that "the extent to which the law, and in particular this branch of the law, should limit the freedom of the press is one upon which opinions differ widely..... There is, of course, no right to absolute freedom of speech either in the law of England or of Scotland: speech is free except in so far as the law restrains it, and therefore the crucial question is what measure of restraint is required in the interests of the due administration of justice".[43] The Younger Committee expressed itself in substantially similar terms.[44]

43. Report of the Committee on Contempt of Court; Cmd. 5794 of 1974 at p. 33.

44. "In considering whether a general right of privacy should be declared by statute, it is relevant to note that this has not been the way in which English law in recent centuries has sought to protect the main democratic rights of citizens. Neither the right of free speech nor the right of assembly is embodied in the statute law. Reliance has been placed on the principle that what is not prohibited is permitted and the main emphasis on the field of civil rights has been placed therefore on keeping within acceptable limits, and providing precise definitions of the restrictions imposed by the civil and criminal law on the individual's freedom of action"
Cmd. 5012 of 1972 at p. 10.

The Diceyan doctrine was taught to many generations of British and Commonwealth lawyers as elementary law. It was happily accepted by many distinguished lawyers and statesmen; as one of the greatest of Australian judges, Sir Owen Dixon, put it in a comparison with the United States Constitution, "in short responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British constitutions and the principles of the Common Law, we have not felt the need of formality and definition".[45]

It may or may not be so. Dahrendorf has very properly said that the desire for liberty in a country depends upon institutions, but as much if not more on the habits formed by people around those institutions.[46] The law in the United States proceeds in a very different way: it imposes broadly-phrased constitutional constraints upon the authority of government. So it is that in "broad, majestic language"[47] the first amendment to the United States Constitution declares that "Congress shall make no law ... abridging the freedom of speech or of the Press". In his *Tagore Lectures* in 1955, Mr. Justice Douglas said of these words: "There are no exceptions. The mandate is in terms of the absolute. Unlike India's Constitution there is no leeway for legislative innovations. The prohibition is all inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy."[48] Justice Douglas at that time, however, still apparently accepted the authority of decisions which held that the law of libel and laws imposing penalties for obscenity were consistent with the terms of the first amendment. Such interpretations meant that despite its unqualified language, the first amendment allowed of accommodations. In more recent

45. Dixon: *Jsting Pilate* (196) at pp. 101-2; See also Menzies, *Central Power in the Australian Commonwealth* (1967) at pp. 49-55
46. *The Lis'ener*, 5 December 1974
47. Skelly Wright: *Professor Bickel, The Scholarly Tradition and the Supreme Court* (1971) 84 Harvard L.R. 769 at p. 784
48. *Studies in Americn and Indian Constitutional Law* p. 238

years, Mr. Justice Douglas, in company with Mr. Justice Black, has asserted that in the first amendment, freedoms of speech and the Press, there can be no such constraints, and this has determined his approach to the law of defamation and obscenity. In the *Sullivan* case, Douglas rejected the view that a defendant's malice or recklessness were permissible qualifications upon a defendant's immunity from action; *any* risk of liability must inhibit speech on matters of public interest and would hence be a violation of the public interest. In one of the most recent of the obscenity cases, *Miller* v *California*,[49] Douglas in dissent declared that "the idea that the first amendment allows the government to ban publications that are offensive to some puts an ominous gloss on freedom of the Press". This absolute position gives expression to the paramount importance of protecting cherised freedoms against the intrusion of government and to the belief that any qualifications or limitations will erode the freedoms assured by the first amendment.[50]

It is a view with which I have little sympathy, and one which may lead to disturbing results. I share the view of Sidney Hook that if such views became the accepted law, democratic self-government would be impossible and the entire structure of freedom would go down in dust and turmoil, and such absolute views have not commanded majority support in the Sureme Court of the United States. Even in such a case as *Sullivan*, some qualification was written by the majority into the otherwise sweeping principle that a remedy in defamation was not constitutionally allowable, and

49. (1973) 413 U.S. 15.

50. See Justice Douglas: *Contribution to the Law* (1974) 74 Columbia L.R. 353; *Evolution to Absolutism—Judge Douglas and the First Amendment*, ibid. 371. In an address in 1973, Justice Douglas noted that he and Justice Black had been criticized for being 'absolutists'. He said that that had 'never bothered us. It was the First Congress and the people who were the absolutists when they made the First Amendment say that Congress shall make 'no law abridging freedom of speech of the Press.'' Quoted Gellhorn: *Dirty Books, Disgusting Pictures and Dreadful Laws* (1974) 8 Georgia L.R. 290 at p. 295.

subsequent cases have asserted the need to make a "proper accommodation between the law of defamation and freedoms of speech and Press protected by the First Amendment", as Mr. Justice Powell put it in *Gertz* v *Robert Welch Inc.*[51] Over long periods, in cases involving defamation, privacy, fair trial and obscenity, the Supreme Court has struggled, sometimes in a confusing and uncertain way, to work out the appropriate accommodations.

I have spoken of the First Amendment particularly; other clauses of the Constitution, including the fourth, fifth, sixth, ninth and fourteenth amendments are also relevant.

The Indian Constitution follows neither Diceyan precept nor the absolutist language of the American first amendment. As the late Professor de Smith pointed out in his study of *The New Commonwealth and Its Constitutions*, India's Constitution of 1950 was constructed with a well-developed bill of rights. It reflected a move away from the Diceyan opposition to such constitutional forms; it was yet another manifestation of that familiar process in which the deplorable becomes recognised as the inevitable and is next applauded as desirable.[52] Be that so or not, the Indian Constitution, as Justice Douglas observed, still allowed some leeway. Article 19 (1)(a) provided that 'all citizens shall have the right to freedom of speech and expression', while Article 19 (2) as amended in 1951 declared that

> "Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

51. (1974) 94 S. Ct. 2997 at p. 3000.
52 at p. 163

It is clearly established that the freedom of speech and expression assured by Article 19 (1) includes within its scope freedom of the Press. At the same time, the terms of Article 19 (2) make it clear that in such contexts as defamation, contempt of court, and decency and morality—to take areas with which we are concerned—there are accommodations to be made. As Mukherjea J. pointed out in *Gopalan* v *State of Madras*,[53] the Constitution attempts to strike a balance between individual liberty and social control. In a discussion of the approaches of the Indian and American courts to the problem of contempt of court and fair trial, Douglas J. spoke of the contrasting strictness of the Indian law, and as Basu points out in his commentaries, the general principles of English common law are followed by the Indian courts in determining what constitutes contempt of court.[54] In *Udeshi* v *State of Maharashtra*,[55] Hidayatullah J. in the Supreme Court of India had to consider the validity of Section 292 of the Indian Penal Code which, *inter alia*, prohibits the sale of any obscene book, by reference to Article 19 of the Constitution. It was argued that Section 292 was void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Article 19 (1)(a), and that it was not saved by Article 19 (2). Hidayatullah J. held that obscenity fell directly within the words 'public decency and morality' in Article 19 (2) of the Constitution.

> "Speaking in terms of the Constitution, it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which

53. (1950) S.C.R. 80, See also Tripathi: *India's Experiment in Freedom of Speech: The First Amendment and Thereafter*, Supreme Court Journal (Madras) (1955) 106; Grossman : *Freedom of expression in India* (1956) 4 U.C.L.A.L.R. 64; *Freedom of the Press in India* (1971 ed. Noorani) at pp. 24 *et seq;* Shukla: *The Constitution of India* (6th ed., Ed. Singh 1975) at p. 61
54. Basu: *Commentary on the Constitution of India* (1965).
55. (1965) 1 S.C.R. 65; A.I.R. (1965) S.C. 881

> our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word 'obscenity' is really not vague because it is a word which is well understood even if persons differ in their attitude to what is obscene and what is not."

In this case, the Supreme Court of India, on appeal, upheld a conviction for selling *Lady Chatterley's Lover*, D. H. Lawrence's celebrated book which, within the space of a few years, made its appearance in the courts of England, the United States and India. In England, a prosecution of Penguin Books under the provisions of the Obscene Publications Act 1959 failed. That was a jury trial.[56] In the United States, a determination by the Postmaster-General that the book was obscene, and was accordingly denied the facilities of the mail, was reversed by a federal District Court.[57] In the three jurisdictions, it was only in India that *Lady Chatterley* remained convicted of obscenity.

Very recently in *Gobind* v *State of Madhya Pradesh*,[58] the Supreme Court of India considered arguments that the State statutory provision for police surveillance over individuals violated the constitutional guarantee in the fundamental rights provided by Articles 19 (1)(d) and 21 of the Constitution. These provide respectively that all citizens shall have the right to move freely throughout the territory of India and that no person shall be deprived of his life or personal liberty except according to procedure established by law. The court

56. See *The Trial of Lady Chatterley* (ed. C.H. Rolph 1961)
57. *Grove Press Inc. and Readers' Subscription Inc.* v *Christenberry*, 175 F. Supp. 488. affd. (1960) 276 F 2d. 433
58. (1975) 2 S.C.C. 148

embarked on the most comprehensive exploration of the right to privacy as yet undertaken by it, and made reference to American cases and writings. It acknowledged the force of the argument that these constitutional provisions should be read as providing some recognition to a claim to privacy, but held that any such claim must be subject to restriction on grounds of compelling public interest. The court held that the petitioner's claim failed, but warned that over-broad legislative provision for police surveillance might be open to constitutional attack.

Generally, however, it would appear that the constitutional assurance of freedom of speech and expression, while giving expression to long-standing Indian aspirations does not, by reason of the interpretation of the qualifications set out in Article 19 (2), afford an approach to the problems of balancing the differing claims which differ significantly from that taken by English courts which are uninhibited by constitutional restraints.

In conclusion, I offer some general comments on developments in the areas of the law with which we shall be concerned in these lectures. When we consider the developments in the law of defamation and of privacy, it is apparent that the pressures have operated differently. Over an extended period, the pressures for reform of the law of defamation have been in the direction of relaxing its severity. There has been an insistent argument that the balance should be shifted in favour of the press and the other media. The language of the media-men in denouncing what they describe as the strictness and the inequity, the stifling and anti-libertarian rules and doctrines of the law of defamation has been strident not infrequently extreme, and certainly confident. The trends in the reform of the law of defamation have been in the direction of improving the position of defendants. In the United States, in *New York Times* v *Sullivan*, the press and the media won a massive victory on the broadest constitutional base. In the case of privacy, and particularly in the

context of the claim for a *general* protection of privacy, the demand for remedies has come from those who seek protection *against* the media. Of course there are other areas of privacy, not significantly related to the activities of the media, and I do not speak of those here. What leads the media to clamour for an easing of the restrictions imposed by the law of defamation leads them to argue against the adoption and formulation of actions and remedies for the infringement of privacy. In these cases, the demands come from the victims or potential victims of the media. As the pressures mount to relax the reach of the law of defamation, they also rise to provide more adequate assurances of the protection of privacy.

In the area of due process and fair trial, the English and Commonwealth approaches on the one side and the approach of the American courts on the other have been far apart. There have been few constraints on the American Press and the media, but strict (though at times inconsistent) constraints on the English-Commonwealth media. The pressures of events, at times, have prompted some rethinking: the excess of publicity at the time of the Lindbergh baby-kidnapping case and in the aftermath of the assassination of President Kennedy have prompted some rethinking in the United States. The *Thalidomide* case in England, on the other hand, has raised anew the question whether the constraints on freedom of discussion in face of great calamity of profound public concern are too strict, and the Phillimore report gives support to the view that they are.

It was said in a recent Indian study that the central question in the problem of obscenity is the extent to which the law should permit liberty and tolerate freedom and the extent to which it should prevent the publication of material which has a tendency towards obscenity.[59] There are great problems in the formulation of a satisfactory definition of

59. *The Roots of Obscenity, Obscenity, Literature and the Law* (1968) at p. 70

obscenity and there are some very real difficulties in defining the interests which the law of obscenity seeks to protect against freedom of speech, publication and of action. The courts themselves are now well aware of shifting standards and values. This point was made in the various courts in which the fate of *Lady Chatterley* was considered. In the Indian Supreme Court, Mr. Justice Hidayatullah observed that "it may be admitted that the world has certainly moved far away from the times when *Pamela, Moll Flanders, Mrs. Warren's Profession* and even *Mill on the Floss* were considered immodest... The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled..."[60] In the United States District Court, Judge Bryan said that "the broadening of freedom of expression and the frankness with which sex and sex relations are dealt with at the present time require no discussion... Much of what is now accepted would have shocked the community to the core a generation ago. Today such things are generally tolerated whether we approve or not".[61] The changes that have occurred in public attitudes in many places over the last few years have been startling. For the courts such shifts in outlook, values and attitudes pose difficult problems, if they are to be sensitive, as they should be, to the needs and interests of a free society. We may still question whether Mr. Justice Douglas is right when he said, in dissent, in a recent case that "obscenity cases... have no business being in the courts... To send men to gaol for violating standards they cannot understand, construe and apply is a monstrous thing to do in a nation dedicated to fair trial and due process".[62] More recently than in the *Lady Chatterley* case, the Supreme Court of India has affirmed, in the context of an obscenity appeal, that the standards of con-

60. ibid. appendix 2 at pp. 98-9.

61. ante note 60 Appendix 4 at p. 143.

62. *Miller* v *California* (1974) 413 U.S. 15.

temporary society in India are fast changing.[63] It is clear that in this area, as in the others which will concern us in the course of these lectures, the problems are complex and difficult. In all these areas, we impose legal constraints on the right to speak, to publish and, in some cases, to act. In the lectures which follow I seek to explore some of these issues.

63. *Chandrakant* v *State of Maharashtra* A.I.R. (1970) S.C. 1390 at p. 1395

2

PROTECTION OF REPUTATION—1

THE CLAIM TO speak and to publish without inhibition or constraint has been a persistent theme of philosophical and public debate. The importance of free expression is accepted without question in the liberal society; there are, however, important and difficult questions about the limits which may properly be imposed upon such expression. In the course of this lecture and the one which follows, I shall examine the claim to such freedom in the context of its impact on the claim to the protection of individual reputation. The issue is not infrequently expressed in terms of the need to maintain a balance between the individual's right to his reputation and the public interest in the assurance of free speech and expression. It is formulated in these terms in the recent Faulks (United Kingdom) Report of the Committee on the law of defamation.[1] The truth is that this is not a conflict or a potential conflict between an individual and a public or social interest; both are social interests and the interest in individual reputation is an interest in the reputation of every man.

The claim to a free press has been stated in very sweeping terms. Thomas Jefferson said that our liberty depends upon the freedom of the Press and that cannot be limited without being lost, while Alexis de Tocqueville wrote that there is no medium between servitude and extreme licence; in order to enjoy the inestimable benefits which the liberty of the press ensures, it is necessary to submit to the inevitable evils which it engenders. There is no suggestion of compromise in such statements, and their breadth is mirrored in such declarations

1. Cmd. 5909 of 1975 at p. 5.

as appear in the first amendment to the Constitution of the United States : "Congress shall make no law.....abridging the freedom of speech or of the press". Those words have been considered many times by American courts in the present context and the tenor of judicial interpretation has not been harmonious. There are judges in our day who would give the words their fullest amplitude ; there are others, and they have comprised a majority, who would read into them a requirement to make accommodations and to strike balances, recognising perhaps, as the late Justice Jackson once put it, that unless doctrinaire logic is tempered with a little practical wisdom, the Bill of Rights would be converted into a suicide pact.[2] I have a strong sympathy with this point of view.

The social and individual interest in the protection of reputation have been acknowledged on many occasions. A contemporary writer on the law of torts says that the law of defamation in protecting reputation recognizes it as perhaps the most clearly-prized individual attribute of man.[3] Those words differ little from those spoken about the claim to privacy by Justice Brandeis in his celebrated judgment in *Olmstead* v *United States*.[4] I have already referred to judicial statements in Commonwealth and United States jurisdictions which assert and acknowledge the need to achieve balance and accommodation between the claims to free press and to fair repute. This is given explicit recognition in such instruments as the Indian Constitution which in Article 19 affirms the right to free speech, which includes free press, and at the same time preserves the operation of laws of libel. It is the task of courts in interpreting the Article to achieve appropriate accommodations. The need to do so within the framework of legal systems which are not governed by specific constitutional constraints has been expressly acknowledged by courts and by bodies charged with recommendations for law reform. The most recent of these is the Faulks Committee on the law of

2. *Terminiello* v *Chicago*, 337 U.S. 1 at p. 37.
3. Flemming on *Torts* (4th ed. 1971) at p. 455.
4. (1928) 277 U.S. 438.

defamation which says in its report that "the law of defamation has two basic purposes : to enable the individual to protect his reputation and to preserve the right of free speech. Those two purposes necessarily conflict. The law of defamation is sound if it preserves a proper balance between them.[5]

The law of defamation, unlike the law of privacy, is old and has evolved over a long period of time. It bears the marks of a complex history and it is generally agreed that it is in need of repair. It has been described as a confused mass of senseless distinctions and overly technical rules,[6] and one of the leading modern American text writers has said that defamatory words have come to be placed in the same category as the use of explosives and the keeping of dangerous animals.[7] The late Professor Harry Kalven wrote that the common law of defamation, yielding slowly to the policies favouring a free press, worked out an elaborate series of accommodations for the competing interests and, as a complement thereto, an elaborate gradation of privileges for false statements about individuals. He observes that the normal basis of liability in defamation, in sharp and puzzling contrast to much of the rest of the law of torts, is strict liability. In the ordinary case, it does not matter how innocent the defendant is if his communication can be read as defaming the plaintiff. The great role of the common law privileges in defamation has therefore been to abate the harshness of the strict liability principle rather than to give exceptional privilege to a particular category of communication. Arguably, if defamation had been assimilated in nineteenth century tort theory and keyed to liability limited to negligence, no doctrine of privilege would have ever developed.[8] Well-known cases

5. Cmd. 5909 of 1975 at p. 4.
6. Skelly Wright: *Defamation, Privacy and the Public's Right to Know*, (1967-8) 46 Texas L.R. 630 at p. 643.
7. Professor: *Handbook of the Law of Tort*, (1964) at p. 792.
8. Kalven: *The Reasonable Man and the First Amendment* Hill, Butts & Walker (1967) Supreme Court Review 267 at pp. 290-1.

like *Hulton* v *Jones*[9] established for the common law that defamation rests not in intent or in the want of due care, but in the publication of a statement of defamatory character. In a modern case, it has been put that the judgment of experience is that some publications are so inherently capable of inflicting injury and actual injury is so difficult to prove that the risk of falsehood should be borne by the publisher and not by the victim. That was said in a dissenting judgment in a major case in the Supreme Court of the United States,[10] but it is a fair statement of the English law.

Long history may produce complex and unsatisfactory law, and much of the burden of criticism of the law of defamation and much of the concern of law reformers reflects this. Modern English judges have had sharp things to say about the state of the law. In *Bolton* v *Bagshaw*,[11] Diplock L.J. said that "lawyers should be ashamed that they have allowed the law of defamation to have become bogged down in such a mass of technicalities". Complexity begets prolixity; Lord Reid complained recently in the House of Lords that "this is not the first occasion on which I have felt bound to express my concern about the undue prolixity of libel actions"[12] and this is repeated many times by critics, learned and lay. The distinctions between libel and slander and the associated glosses and accretions have been described as outworn rubbish :[13] these distinctions are ultimately attributable to historical accident and this is an area of law in which the forms of action still rule from the grave.[14] They have long been abolished in some Australian jurisdictions, though they survive in others, and they have been abolished in other Com-

9. (1910) A.C. 20.
10. *Gertz* v *Robert Welch Inc.*, (1974) 94 S. Ct. 2997 at p. 3025 per White J.
11. (1966) W.L.R. 1126 at 1135.
12. *Cassell & Co. Ltd.* v *Browne* (1972) A.C. 1027 at 1091.
13. Lloyd: *Reform of the Law of Libel*, (1952) Current Legal Problems 168 at p. 180.
14. Faulks: Cmd. 5909 of 1975 at p. 20.

monwealth jurisdictions.[15] Surprisingly, it would seem, the Porter Committee which reported in 1948 in the United Kingdom resolved by a majority not to propose their abolition,[16] but the Faulks Committee which reported in 1975 recommended without hesitation that they be swept away.

The law on the defence of justification or truth, which with statutory amendments exhibits various faces, has itself given rise to difficulties which we shall consider in more detail later, while the rules of privilege and fair comment have added their contribution of complication and uncertainty to the law. The defence of privilege, it has been aptly pointed out, is concerned not so much with content as with occasion. More than fifty years ago, in *Adam* v *Ward*,[17] Lord Atkinson said that privilege arose where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. Occasions that qualify for privilege can never be catalogued or rendered exact. New arrangements of business and habits of life may project patterns which, though different from well-settled instances of privilege, could nevertheless fall within the flexible definition referred to. Attempts to provide all-embracing statutory definitions and listings of privilege have not proved satisfactory[18] and commissions in the United Kingdom and elsewhere have recommended additions to the categories of protected reports and publications.[19] Fair comment has long been established as a defence to an action for defamation on the footing that comment on matters of public interest is of such surpassing social importance in a democra-

15. In *Gertz* v *Robert Welch Inc.* (1974) 94 St. Ct. 2997 at pp. 3002-4, White J. gives an account of these distinctions in United States jurisdictions.
16. Cmd. 7536 of 1948.
17. (1917) A.C. 309 at p. 334
18. See Defamation Act 1958 (N.S.W.) and criticisms of it in the Report of the Law Reform Commission on Defamation (Law Reform Commission of N.S.W. 1971)
11. Both the *Porter* and the *Faulks* Committees did so.

tic community that its free publication outweighs the competing claim to protection of individual reputation. The untrammelled discussion of public affairs and critical comment on those involved in them—within the limits prescribed by the defence—are seen as a basic safeguard against irresponsible political power. At common law, the defence of fair comment draws a sharp distinction between fact and comment; as C.P. Scott, the distinguished Editor of the *Manchester Guardian*, put it, comment is free, but facts are sacred. In this area of the law, once again, there are complexities, historical curiosities and uncertainties, and the New South Wales Law Reform Commission saw the need to reformulate the law on such comment as one of its "central tasks"[20], as did the Faulks Committee in the United Kingdom.

There is also the question of the law of damages. This is a matter of controversy, though there can be no doubt that in this area of the law, as Lord Devlin said in *Rookes* v *Barnard*,[21] the power to award exemplary damages can be used against liberty. In *Gertz* v *Robert Welch Inc.*,[22] Powell J. delivering the judgment of the Supreme Court of the United States observed that "jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship". Fleming has spoken of the "baneful effect"[23] of the operation of damages in the area of defamation, and the threat of massive verdicts has been described by press and media critics of the law of defamation as one of the most serious threats to the free press. In a notable judgment, an Australian judge has said that

> "The public utility of public communication is something which has become more apparently valuable in modern times than in previous times, and this has become so at the same time as the power which lies behind the capacity for public communication has come more to be

20. Report ante note 18 at p. 12
21. [1964] A.C. 1129.
22. (1974) 94 Sup. Ct. 2997 at 3012.
23. *Torts* (4th ed. 1971) a p.

> feared. The result is an anomalous situation. On the one hand, the freedom of the Press had come to be recognised more than ever as a shield against tyranny, whatever political, administrative or financial form the tyranny may take. On the other hand, the press has come to be feared as itself a source of overbearing if not of tyranny. I think that a reflection of the latter aspect is the abnormally high verdicts which have in recent times been found against newspapers by juries... It is an ill thing that the individual should suffer, but it would be a worse thing if, for fear of the consequences, the freedom of speech should be cribbed and confined."[24]

The particular issue of damages, which has been discussed and debated in many places, will concern us later; it is by no means clear to me that the critics are wholly right, and the last sentence from the judgment quoted is, to my mind anyway, questionable in the breadth of its assertion.

All of these matters have been canvassed by commissions and committees in various jurisdictions, recently in Australia, and very recently by the Faulks Committee in the United Kingdom. That committee considered various objections to the existing law and practice: that defamation cases were unduly long and unnecessarily costly, that their outcomes both in terms of liability and of damages were unpredictable, and that such a complicated body of law had been built up that the defeated litigant could often find some arguable point on which to appeal. The committee said that there was much force in such arguments and proposed recommendations which would remove complexities and technicalities wherever possible. At the same time, it drew attention to the fact that some of the complexities were an inevitable consequence of the effort to strike and to maintain a balance between the individual right to his reputation and the public interest to

24. *Clines* v *Aust. Consolidated Press*, 84 W.N. (Part 2) (N.S.W.) at p. 105 per Jacobs J.A.

preserve free speech. Subject to the correction that the need is to maintain balance between two competing *public* interests, the point is properly made. In this area, the achievement of balance and accommodation, particularly in the light of changing curcumstances and values and the rapid development of media technology, will almost certainly prove to be a complex task.

In a commentary on the report in 1948 of the Porter Committee on the law of defamation, Lord Lloyd observed that newspapers loom so large in the contemporary debate on the law of defamation that the topic tends very largely to be discussed in terms of the freedom of the Press.[24a] The New South Wales Law Reform Commission in its report on defamation in 1971 noted that the critical voices most consistently heard were those of defendants, particularly newspapers. "The difficulty", it was said, "about consulting people about the law of defamation is that prospective defamers are better organised and more articulate than prospective plaintiffs. A newspaper company knows where the shoe pinches and has the experience and resources to put its views persuasively. No one has put anything to us which is intentionally unfair to plaintiffs, but it is natural that the plight of a defendant should be seen in strong colours by people who have many times been defendants."[25] The reference by the Attorney-General to that committee was to enquire into the extent to which the law of libel (*inter alia*) hampered the *press* in publishing facts of public interest and in editorial comment thereon within the limit of what is necessary for the protection of the liberty of the subject and the security of the State.[26]

Much of the argument addressed to the Porter Committee came from press sources; the committee observed that authors, critics, journalists, publishers, newspaper proprietors and others in the industry were particularly liable to become defendants and that the criticisms of the existing law were submitted

24a. (1952) 5 Current Legal Problems 168 p. 171.
25. Report, ante note 18 at p. 8.
26. ibid at p. 7.

with skill, lucidity and also with moderation by their respective and representative organisations. Plaintiffs in defamation actions were, on the other hand, drawn from all sections of the community and were therefore not represented before the committee which was obliged in preparing its report to draw upon its own practical knowledge and experience in an endeavour to redress the balance. Lord Lloyd noted in his commentary on the Porter report that it is not without significance that of the substantive proposals calculated to assist plaintiffs only a single one was acceded to, and then only partially, whereas all of those intended to relieve defendants and particularly newspapers were accepted by the Committee..[27] Of course, it may be that this was where the need lay. In a later commentary on the report of the joint working party of Justice and the British Committee of the International Press Institute under the chairmanship of Lord Shawcross in 1965, which he characterized as "an extraordinary disappointing one",[28] Lloyd again pointed to the fact that the committee, substantially manned by press representatives, drew its evidence in a one-sided way from press sources and nowhere acknowledged or recognized that the press is largely owned and controlled by a few individuals and that, by virtue of its vast resources and large circulation, it can exercise immense power.

Certainly the voices of protest against the current state of the law are many. The joint working party of 1965 complained that the press was "unfairly vulnerable",[29] and it has been said by writers canvassing the state of freedom(s) in Australia that the law of defamation is in need of urgent repair, that the press is seen as a milch cow, that it has to operate under a law of defamation which is uncertain, oppressive in its exaction of damages, and that the interest in freedom of expression is too often overlooked.[30] The

27. ante note 18 at p. 8.
28. (1966) Current Legal Problems 43 at p. 45.
29. *'The Law and the Press* (1965).
30. Campbell and Whitmore: *Freedom in Australia* (2nd ed. 1973) at pp. 371-2.

voices of individual publicists and pressmen are no less definite; Mr. Cecil Haymsworth King said that libel affects the press in an arbitrary and indeterminate way; others pray in aid a lively vocabulary and assert that libel laws are archaic, repressive, vindictive and stifling. A New Zealand author reviewing the state of *News Media Law in New Zealand* says, rather more temperately, though in harmony with the more vituperative voices, that the law of defamation is "unkind"[31] to the news media. The press has expressed itself on the matter. Not long after the publication of the report of the Porter Committee, the *London Economist* argued that the law of libel unjustifiably restricted investigative journalism. It gave as an example a current investigation under the chairmanship of Lord Justice Lynskey which exposed the malefactions of a colourful character of yesteryear, Mr. Sidney Stanley, and the wrong-doings of people in comparatively high public places. It was said that these machinations could not have been exposed while they were in progress, and it was also said that the press could not risk the kind of personal appraisals published as the famous *Profiles* of the *New Yorker* magazine. The conclusion was that the law of libel was an engine of repression in denying to the press the right to "expose fraud, hypocrisy and evil without fear of retribution".[32] Some years later the *London Times* complained that the press was "stifled" by the uncertain laws of defamation.[33] A contemporary version of the same theme is the strong statement by a distinguished Australian Editor, the late Mr. Graham Perkin,

> "The Australian press is tragically inhibited by the defamation law's extreme complexity, its uncertainty, its technicality, its absurdity and its uncontrolled potential for damages. For fear of the law and its consequences, information of serious public importance has to be suppressed.
>
> "This is not an argument that the rights of individuals

31. Burrows: *News Media Law in New Zealand* (1974) at p. 10.
32. *Economist* October 22, 1949 at p. 877.
33. *Times October* 4, 1965.

should be subordinate to press freedom. On the contrary, individual reputations must be given high value—but not so high a value that they transcend the right of all the people to know the truth."[34]

There is no doubt that there are technicalities and complexities in the law, and that its substantive and procedural requirements lead to prolixity and swollen costs, and law reform commissions and committees have proposed reforms to cure these ills. The arguments of the press and mediamen go far beyond this in claiming that the current state of the law makes for repression of free expression. When one analyses such statements as this there are puzzling elements: what is claimed is the right to tell so that people may know the truth. Yet the jurisdiction in which the Australian editor spoke and wrote is one in which the common law defence of justification prevails : that truth is an absolute defence, while elsewhere in Australia there are superadded requirements that the defendant should prove public benefit or public interest. In *New York Times* v *Sullivan*,[35] however, where the Supreme Court of the United States considered this particular issue in the context of constitutional limitations on the right of public officials to sue for defamation, it was said that the question of truth or false should not be decisive, since it made for uncertainty in that the publisher could not know in advance whether the defence would be sustained and that this would operate as a constraint upon free and unfettered expression. Mr. Perkin, the editor from whose lecture I have quoted, would not, it seems, go as far as that ; others who argue for a special press law would do so. Perkin, however, claims as 'fact' that the Watergate scandals could not have been revealed by the Press in Australia without grave risk of collision with the law, in the area of contempt of court and more particularly of libel. This Watergate argument has been

34. Perkin: *The Hoo Ha Machine* (The Arthur Norman Smith Memorial Lecture for 1974) in Advertising, Marketing and Media Weekly, September 26, 1974 at p. 29.
35. (1964) 376 U.S. at pp. 278-9.

developed by others in this context. The Phillimore Committee on *Contempt of Court* which reported in 1974 commented in a passage on investigative journalism that the English law of defamation imposes "significant restraints"[36] on overzealous exposures. As to this, it has to be asked when one is measuring the impact on personal fame and repute whether there is any case for protecting the overzealous ? As the dust settles a little, there are questions to be asked about the Watergate type issue. It has been fairly pointed out that while the media contributed to the exposure of activities and personal conduct and served the public interest well in doing so, it is also the case that in the aftermath of Watergate—the whole complex of events and acts under that umbrella title—there has been an orgy of investigation and disclosure, and there may well be a danger of overstepping reasonable bounds. There is more than a possibility that this activity may stimulate in people an ever-increasing appetite for scandal, and the crusading journalist may, in fact, be wrong : there is no infallibility among journalists anymore than among politicians and there is less, not more, opportunity for calling them to account.[37] Unless one is prepared to sustain the argument that the media should be granted a privilege in the public interests to be wrong in their *facts*, we do well to hesitate before seeing in Watergate-type disclosures the virtues of an American defamation law and the vices of the constraints imposed by English law and its progeny. It is the case that responsible pressmen have acknowledged and affirmed the importance of safeguarding individual reputation, but their criticisms of the law are vehement and leave no doubt of their view that the scales are unjustly tipped against the freedom of expression necessary to serve the public interest. The argument does not all go one way ; some lawyers who acknowledge the need for reform believe that the press criticisms of the law are framed extravagantly and that, in some cases any-

36. Cmd 5794 of 1974 at p. 43
37. Beloff: *America after Watergate* (1975) 257 Round Table at pp. 30-32.

way, they argue a special and unjustifiable case for press privilege.[38] The point is also made by thoughtful laymen : in an address to a recent Australian legal convention, the then Governor-General of Australia, Sir Pall Hasluck, said:

> "Let me add that one of the more dangerous pretensions of the media is that there is some right to invade privacy if it serves what is called 'public interest' to do so and the further pretension that the only person to judge what is a 'public interest' is the person who wants to make the invasion. I should like to see more lawyers giving attention to maintaining the reasonable boundaries between what is a person's own business and what is a matter of legitimate public concern.
>
> "May I further illustrate my theme by mentioning recent public discussion in Australia of proposed amendments to the law respecting defamation. Much of this discussion has laid the emphasis on the proposition that the present law restricts the media, or even public authorities, in their inquiries into matters in which they are interested. They are inhibited by the fear of legal action against them. Some of the discussion has come pretty close to saying that there should be wider liberty to delve into the personal affairs of any person in the public eye and to publish what can be uncovered. Scant reference has been made to what seems to me to be the fundamental truth that laws on defamation...were devised to protect the individual person against the powerful institutions, even against public authority, and against the ill-will and the prying of his neighbours. This fundamental right of the individual to protect his own privacy and defend his reputation is still something that needs to be safeguarded and I trust that lawyers will see that, in the discussion of the law of defamation, the rights of the private person are not damaged or eroded."

38. See Lloyd: *The Law and the Press* (1966) Current L.P. 43 at pp 53 et seq; Heuston: *Recent Developments in the Law of Defamation* (1966) 1. Irish Jurist 247.

Almost a quarter century ago, Lord Lloyd, a distinguished lawyer, had some trenchant things to say about the claims of the press that the existing law of defamation denied to it the freedom which the *Economist* claimed to be necessary to "expose fraud, hypocrisy and evil without fear of retribution" and he repeated his points, persuasively as it seems to me, some years later when he reviewed the report of the Shawcross report on the *Law and the Press,* the report of the joint working party of Justice and the International Press Institute. There he characterized claims, such as those made in *The Times* that the press was "stifled" by the law of defamation as "tendentious assertions" and as seriously exaggerated.[39] This met strongly-worded assertions with equally blunt and strongly-worded rejections. Lloyd observed with force that the virtues of a free society can only be acceptable in a society where the utmost pains have been taken to preserve the rights of the individual who may be at a grave disadvantage in resisting the pressures of great and powerful organizations possessed, as they may be, in comparison with the individual, of almost unbounded resource. He also warned that there may be error in assuming that the interests of the writer or publisher and the interests of the public itself are synonymous. The press has often stated its argument in terms that the right of the reader to read what he likes and the right of the publisher to publish what he likes are identical. There *may* be a correspondence, but in a situation in which access to the press and the media may be severely limited, in which there may be a heavy concentration of media ownership in fewer and fewer hands, and in which, in consequence, the press has a substantial, perhaps even overwhelming, financial and tactical strength and advantage, it is necessary to caution against the claim that the public interest can be expressed simply in terms of freedom of the press. Allowing for the term 'Press' to cover media generally, the question has to be asked : what sort of

39. Lloyd, *Reform of the Law of Libel* (1952) Current Legal Problems 168: *The Law and the Press* (1966) Current Legal problems 43.

press, how organized, how structured? In a recent case, in summarizing arguments addressed to the court, the Chief Justice of the Supreme Court of the United States, Burger, set out quite explicitly the character of the change which had taken place since the enactment of the First Amendment at the end of the eighteenth century.

> "...While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true market place of ideas existed in which there was relatively easy access to the channels of communication."[40]

The contemporary situation is very different. In the first place, there had been a communications revolution which had seen the introduction of radio and television and the promise of a global community through the use of communications satellites. As to the press,

> "...Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services and one newspaper towns are the dominant features of a press that had become non-competitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events... The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion... The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires...the same economic factors which have caused the disappearance of vast

40. *Miami Herald Publishing Co.* v *Tornillo* (1974) 94 St. Ct. 2831 at p. 2835 per Berger C.J.

> numbers of metropolitan newspapers have made entry into the market place of ideas served by the print media almost impossible... The First Amendment interest of the public in being informed is said to be in peril because the 'market place of ideas' is today a monopoly controlled by the owners of the market."[41]

In a companion case, another member of the same court put it that the communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the nation and into almost every home.[42] This was supported by reference to the changes which had taken place in the structure of the newspaper industry, to profound economic changes, and to the interlocking of media interests in which radio, television and newspaper facilities were not infrequently in common control. Commissions of Enquiry into the press have been set up because of a concern with the changing structure of the media industry. The Ross Commission on the Press was constituted in the United Kingdom in 1947 to enquire into the financial control, management and ownership of the press with the object of furthering the free expression of opinion and the greatest possible accuracy in the presentation of news.[43] The parliamentary debate which led to its appointment had given expression to concern at the growth of monopolistic tendencies in the control of the press. Similar concern had been expressed by the American (Hutchins) Commission on the *Freedom of the Press* which stated in 1974 that "the right of free public expression has...lost its earlier reality."[44]

In the United Kingdom, a second Royal Commission

41. ibid. at pp. 2835, 2836.
42. *Gertz v Robert Welch Inc.* (1974) 97 S.Ct. 2997 at p. 3032, per White J. dissenting. This was supported by a footnote referring to a *Note*: *Media and the First Amendment in a Free Society* (1972) 60 Georgetown L.J. 867.
43. Levy: *The Press Council, History, Procedure and Cases* (1967).
44. Commission on Freedom of the Press: A Free and Responsible Press (1947) at p. 15. Quoted *Miami Herald Publishing Co.* v *Tornillo* (1974) 94 S.Ct. 2835 at p. 2836.

on the Press under the chairmanship of Lord Shawcross was appointed in 1961 largely because of concern arising from the disappearance of major daily newspapers. The Ross Commission had recommended the establishment of a General Council of the Press, a recommendation which was not acted on and was indeed resisted by the press for some years,—untill in 1953 a Press Council composed entirely of press representatives was established more under threat than as an exercise of free will.[45] The Shawcross Commission complained of the poor performance of the Press Council particularly in the investigation of the economic problems and functions of the industry; it said that it should be restructured to include non-press representatives and a lay chairman. This was in fact done, at least in some degree, in response to a threat of legislative action unless the press moved promptly. In the United States, a task force commissioned by the Twentieth Century Fund reported in 1973 that "the concentration of nationwide news organisations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them".[46]

Arguments about the press, the media, and the operation of the law of defamation and the social interests involved must be viewed against this background. Lord Lloyd made the point effectively in his reviews of the *Porter* and *Shawcross* reports in the United Kingdom and his conclusion was that such committees seem to have been over ready to listen to the voice of the press as the voice of freedom incarnate. It has been put, in an American context, that the constitutional law of the United States has been singularly indifferent to the reality and implications of non-governmental obstruction to the spread of political truth, and this indifference becomes critical when a comparatively few private interests

45. Levy *op cit*, note 43 at p. 10.
46. Report of the Task Force, The Twentieth Century Fund Task-force Report for a National News Council, *A Free and Responsive Press* (1973) at p. 4.

are in a position to determine not only the control of information but its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper.[47] It is the case that there has been an alarming concentration of ownership of mass media facilities, and it is also the case that the freedom of the press involves not only a freedom to publish but also a freedom of choice of a newspaper to read.

Against this background, we consider the line of cases starting with *New York Times* v *Sullivan*[48] in which the Supreme Court of the United States reviewed the operation of the law of defamation within the constraining constitutional context of the first amendment—"Congress shall make no law abridging the freedom of speech or of the Press." These cases, in the approving words of an American lawyer witness before the United Kingdom Faulks Committee, have established a law of libel in matters of public or general concern "which enables the responsible press to perform its proper function without fear of nuisance libel suits"[49] The witness was counsel for Time-Life Inc.; he had a definite point of view and his summary of the effect of the decisions includes words 'responsible', 'proper', 'nuisance libel suits' which are those of an advocate. They may be set against the judgment of a well-known and experienced American editor who wrote of the body of law generated by *Sullivan* that it allows the press and television the truly astonishing privilege to libel with impunity and with equal impunity to invade the privacy of anyone whose privacy they choose to invade.[50] These are certainly very different views.

There is no doubt that the *Sullivan case* marked a distinct departure in the United States constitutional doctrine, and that

47. Barron: *Access to the Press—A New First Amendment Right* (1967) 80 Harvard L.R. 1641 at p. 1643.
48. (1964) 37 U.S. 254.
49. Cmd. 5909 of 1975 at p. 166.
50. Podhoretz: *Wrong with Free Speech, Commentary* Vol. 54 No. 5 (1973) at p. 6.

it added a new dimension to the law of libel.[51] Up to that point in time, it had not been doubted by the courts that the operation of the common law of defamation was consistent with the constitutional prescriptions of the first amendment. In *Near* v *Minnesota*[52] it was said in the Supreme Court of the United States that punishment for the abuse of the liberty accorded to the press was essential to the protection of the public and that the common law rules that subject the libeller to responsibility for the public offence, as well as for the private injunction, were not abolished by the privilege extended in the Constitution, and there was very substantial body of decided cases affirming this.[53] In this Tagore Lectures in 1955, Justice Douglas noted that the United States law did not sanction unrestrained and unlimited free speech and that the laws of defamation had deep roots in Anglo-American-Indian law. He referred to decisions of the Supreme Court which qualified the seemingly unbounded words of the first amendment by allowing state libel laws to reach publications with a political and social thrust, though he observed that this put a gloss on the first amendmentt.[54]

Over the last decade the Supreme Court has considered the law of libel in the context of publications relating to public officials, public figures and to events and matters of public or general interest. Starting from a position of general agreement that the Constitution imposed constraints on the reach of the law of libel to provide a remedy for publications defaming public officials, though with disagreement on the qualifications, the court considered the case of public figures with

51. 'Skelly Wright: *Defamation, Privacy and Public's Right to Know.* A National Problem and a New Approach (196) 46 Texas L.R. 630 at p. 643; see also Pedrick: *Freedom of the Press and the Law of Libel,* the Modern Revised Translation (1964) 49 Cornell L.J. 581.
52. (1931) 283 U.S. 697 at p. 714.
53. See *Gertz* v *Robert Welch Inc.* (1974) 94 S. Ct. 2997 at pp. 3029-30, per White J.
54. *Studies in American and Indian Constitutional Law* (1956) at pp. 238-242.

somewhat less agreement, and divided more sharply on the issue of the reach of the law of libel in the reporting of matters of public or general interest. Mr Justice Douglas, who has moved from the position stated in his Tagore Lectures to one in which he asserts that there is no question of an accommodation between the law of defamation and the freedoms of speech and press protected by the first amendment, and that the law of libel may not operate within this area, has characterized the current state of the law as a "quagmire".[55]

In *New York Times* v *Sullivan*,[56] the plaintiff was an elected commissioner in Montgomery, Alabama, and his responsibilities included the supervision of the police department. He sued for libel in Alabama claiming damages from the *New York Times* and individuals in respect of the publication of a paid advertisement in that paper. The advertisement endorsed civil rights demonstrations by black students in Alabama and implicitly condemned the actions of local law enforcement officials. Some of the factual statements were false and the *New York Times* took no action to check their accuracy. Sullivan was not named in the advertisement, but brought action on the footing that the words could be reasonably held to apply to him as the official responsible for public supervision. The Alabama court held that the words constituted libel under the State law, that the defendant could not sustain the only defence open to it, which was truth, and damages in the sum of $500,000 were awarded. The verdict was sustained by the Supreme Court of Alabama, but was reversed by the Supreme Court of the United States.

It is to be observed that the circulation of the *New York Times* in Alabama was very small and that the defamatory reference to the plaintiff could be sustained only by a strained construction. It might have been open to the court to decide the case on the footing that such a massive judgment, in this context, was a patent miscarriage of justice, that it posed a

55. *Gertz* v *Robert Welch Inc.* (1974) 94 S.Ct. 2997 at p. 3015.
56. (1964) 376 U.S. 254.

substantial threat to the free communication of ideas, and was constitutionally objectionable on that ground,[57] but the Court chose to take higher ground. It viewed the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials".[58] It held that the first amendment operated to deny to Sullivan as a public official a right of action for defamation and that the Alabama law, to the extent that it permitted such an action, was unconstitutional. It was common ground that the issue, true or false, should not be decisive, that to allow such a question would open up areas of uncertainty which would discourage free expression. Even if a statement were true or believed to be true, a speaker or publisher might be inhibited because of doubt as to whether it could be proved true or because of fear of the expense involved in tendering such proof. The division in the court occurred over the limits to the constitutional exemption; a majority in the court would have allowed action on proof of malice, that is, knowledge that he statement was false or reckless disregard of whether it was true or not. Black, Douglas and Goldberg JJ found such a limitation unacceptable; their view was that the prescription of the first amendment was absolute and that there was no warrant for the malice exception. "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of the government think that what is said is unwise, unfair, false or malicious".[59]

New York Times v *Sullivan* was a decision of major importance. One learned commentator judged that it might prove to be the best and most important decision that the

57. See Pedrick, op cit ante note(51).

58. (1964) 376 U.S. 254 at p. 270.

59. At pp. 398-9, per Goldberg and Douglas JJ.

court had ever produced[60] and Alexander Meiklejohn wrote of it that it was an occasion for dancing in the streets.[61] It was a major departure from long-established doctrine; it did not formulate the issues in terms of a balancing of competing interests but, almost baldly, asserted the right to free expression subject only to the very limited qualification of malice, and even that qualification was rejected by three judges. Though framed in terms of a rule relating to public officials, it was observed by contemporary commentators that the thrust of the argument should extend beyond that: the logic was said to be that what lay within the public domain should enjoy the protection of the First Amendment. As Pedrick wrote in an early review of the case, "it is enough to assert with some confidence that the step taken in *The Times* decision ought to mean that the press and all citizens for that matter will hereafter enjoy a good faith privilege with respect to the discussion of matters of public concern."[62]

The next extension was to public figures, and in companion cases in 1967, *Curtis Publishing Co.* v *Butts* and *Associated Press* v *Walker*,[63] the Supreme Court so held. In *Butts*, the *Saturday Evening Post*, cultivating a new and perilous image, published an article in which the well-known coach Wally Butts of the University of Georgia was said to have conspired with the coach of the University of Alabama to fix a football game between the two universities. Butts was awarded heavy damages by the jury, which were reduced to a still very substantial $460,000 by the trial Court. Walker,

60. Kalven: *The New York Times Case: A note on the Central Meaning of the First Amendment* (1964) Sup.Ct. Review 191 at p. 194.

61. ibid at p. 221.

62. Pedrick: *Freedom of the Press and the Law of Libel: The Modern Revised Translation* (1964) 49 Cornell L.J. 581 at p. 595. See also Kalven, op cit note(60) at p. 221. "The invitation to follow in dialectic progression from public official to government policy in the public domain ... seems to me to be overwhelming.".

63. (1967), 388 U.S. 130

a retired general, who had attracted public notoriety because of his political views, was involved in riotous activities in the University of Mississippi, which followed a court decree ordering the enrolment of a negro student, James Meredith. Three different views were propounded. Warren, C.J., Brennan and White JJ. applied the *Sullivan* rule to public figures who were not public officials, and were not involved in the political process. It was said that they played an influencial role in society and that there was a legitimate and substantial interest in their conduct. The consequence was that the public interest in uninhibited discussion of and debate on their activities must be respected as the only means by which society could attempt to influence their conduct. Black and Douglas JJ. asserted, as in *Sullivan*, that the press must not be fettered by libel actions. Harlan J., with the support of three judges, formulated for public figures a somewhat different standard : in their case damages might be recovered for defamation on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers. Out of this diversity of views came an accord that the verdict in *Butts* should be sustained, and no member of the Supreme Court voted to reverse the finding that the conduct of the publisher was unreasonable. In the case of *Walker*, however, the most that could be established was negligence, so that there was no recovery within that rule.

A majority in these cases supported a standard for public figures equivalent to the standard for public officials formulated in *Sullivan*. In *Rosenbloom* v *Metromedia*[64] there was a disagreement on the reach of the *Sullivan* doctrine, on the question whether the *Sullivan* privilege extended to defamatory falsehoods relating to purely private persons, if the statements concerned matters of general or public interest. It was said by Justice Brennan that if a matter were a subject of such public or general interest, it fell within the *Sullivan* rule,

64. (1971) 403 U.S. 29.

and it could not suddenly become less so because a private individual was involved or because in some sense the individual did not choose to become involved. Three judges drew back from this conclusion, while Black and Douglas JJ. persisted unshaken in their proposition that the first amendment allowed of no action for defamation in such cases.

In *Gertz v Robert Welch Inc.*,[65] the plaintiff was vehemently attacked in a publication and was falsely charged with being a "Leninist" a ',Communist Fronter", with membership of named organisations, and with participation and involvement in a Communist attack on the Chicago police during the 1968 Democratic Convention. The federal trial court, upheld by the Court of Appeals, held that the plaintiff's action must fail : that the *Sullivan* doctrine protected discussion of any public issue without regard to the status of the person defamed. Furthermore, under the *Sullivan* test malice could not be established in this case ; mere proof of failure by the editor to investigate what had been written by the author of the article could not establish reckless disregard for the truth. The Supreme Court, by a bare majority, reversed this decision. Justice Powell joined by three judges and supported, albeit hesitantly, by Blackmun J. in a short separate concurrence, held that the constitutional standards of *Sullivan-Butts-Walker* were not applicable in the case of a defamed private person, though the issue was one of public or general interest. A public official and a public figure had significantly greater access to the channels of effective communication and consequently had open to him a better opportunity to counteract false and defamatory statements, whereas private individuals were more vulnerable. Public officials in seeking and conducting themselves in public office ran the risk of closer public scrutiny and there was a pervasive social interest in their activities and conduct. Those classed as public figures had also thrust themselves into the spotlight. It followed that

public officials and public figures have voluntarily ex-

65. (1974) 94 Sup.Ct. 2997.

> posed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual... He has relinquished no part of his interest in the protection of his own good name and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery. For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.[66]

This did not mean that the first amendment imposed no qualification upon the common law of libel in such a case. A rule of strict liability which left a defendant publisher with only a defence of truth "may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties".[67] So long as they did not impose liability without fault, however, the States might define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

There was a further qualification in respect of damages. The countervailing State interest in the protection of individual reputation did not allow of punitive or exemplary damages or of damages without proof of actual injury, and limited damages to proved injury. While these might be liberally interpreted to include recognition of 'impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering',[68] they must be limited to actual injury. These qualifications recognise

66. at p. 3010
67. at p. 3007
68. at p. 3011.

> "the strength of the legitimate State interest in compensating private individuals for wrongful injury to reputation, yet (shield) the press and broadcast media from the rigors of strict liability for defamation".[69]

This became a majority decision only because of the concurrence of Justice Blackmun who, while preferring a broader scope for the first amendment protection as in *Rosenbloom*, accepted the need for the court to come to rest in this area of law. This was not acceptable to Justice Douglas who remained faithful to the view that the first amendment cloaked the news media with an absolute and indefeasible immunity from liability for defamation, nor to Justice Brennan who adhered to the view he propounded in *Rosenbloom* that the *Sullivan* privilege and policy extended to media reports of the involvement of private individuals in events of public or general interest. He rejected the argument that public officials or public figures were better able to protect themselves as 'too insubstantial a reed on which to rest a constitutional distinction',[70] and likewise dismissed as legal fiction the proposition that public figures had voluntarily exposed themselves, whereas private individuals had not done so. In his view, the majority limitation of liability to a standard of care short of strict liability was too restrictive; it would "lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication."[71] The limitation of damages to actual injury was also an unacceptable constraint since the very possibility of having to engage in litigation would itself inhibit free publication. Justice Brennan concluded:

> "...On the other hand, the uncertainties which the media face under today's decision are largely avoided by *The Times* standard... The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the 'general or public interest'

69. at p. 3001.
70. at p. 3019.
71. at p. 3029.

concept should be of far less concern to publishers and broadcasters than that occasioned by State laws imposing liability for negligent falsehood."[72]

Two members of the Court dissented on very different grounds. The Chief Justice, Burger, would have rejected a departure from common law doctrines of defamation in the case of defamation of a private person; there was much uncertainty in a negligence doctrine and he would "prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry."[73] Justice White strongly and vehemently argued for the maintenance of common law rules of defamation. He viewed the *Sullivan* rule as a limited exception, and he strongly rejected the majority arguments which required a standard short of strict liability and limited damages to actual injury.

> I continue to subscribe to *New York Times* and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems from its willingness to 'sacrifice good sense to a syllogism'—to find in the *New York Times* doctrine an infinite elasticity... I fail to see how the quality or quantity of public debate will be promoted by further emasculation of State libel laws for the benefit of the news media... It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems... This case ultimately comes down to the importance the Court attaches to society's 'pervasive and strong interest in preventing and redressing attacks upon reputation'... From all that I have seen the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise... The

72. at p. 3021.
73. at p. 3014.

case against razing State libel laws is compelling when considered in the light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few."[74]

I have spent considerable time in tracing out the diverse judicial views in this notable case. As a lawyer trained in a common law system in which judges are, for the most part, less disposed to set out their values and philosophy, partly it may be because the issues rarely come to them in so broad a sweep, I am moved by the clash of the judicial debate. Yet it is not easy to thread a path through what Justice Douglas describes as a quagmire. Alone to him, surviving Black, it appears that the social interest is clearly served by demanding unfettered freedom of the press as a matter of constitutional obligation and I have always felt, reading his argument, that as Erwin Griswold has said, "absolute is in the dark." The arguments advanced by Mr. Justice Brennan, which gives expression to the views of some of the commentators who wrote in the immediate aftermath of *Sullivan*, is that the great step taken in that case, which was a major departure, led inexorably and appropriately to the conclusion that the first amendment protected discussion of public or general interest, and inevitably qualified the rights of private persons to sue for defamation. What emerges in the majority opinion of Justice Powell in *Gertz* is a set of compromises first suggested in *Rosenbloom v Metromedia*, and more fully developed in the later case, and designed to bring some rest to the decade-old struggle "to define the proper accommodation between the law of defamation and the freedom of speech and press protected by the First Amendment".[75] The compromise struck in the *Gertz* majority opinion have some support in historic principles of the common law : that liability should depend on a showing of failure to observe a reasonable standard and on a showing of actual injury. That, however, was not the historic path which the common law of defama-

74. at pp. 3036, 3037, 3038.
75. at p. 3000.

tion followed. It developed rules of strict liability, with appropriate defences of truth, privileges and fair comment. The difficulties in the proof of damage in defamation produced a rule which did not require such proof. All of these points were powerfully made by Justice White in his long and cogently argued dissent in *Gertz*. A common lawyer from outside the United States may perhaps ask why Justice White gave support in principle to the broad scope of the doctrine in respect of public officials and public figures, since common law would have accorded a substantial, though a lesser, measure of protection to defendants in such cases under the rules of fair comment. I shall consider these questions further in the next lecture.

3.

PROTECTION OF REPUTATION—2

THE DECISIONS OF the Supreme Court of the United States over the last decade have wrought major changes in the law of defamation. These have been summed up in terms that the libel law has become one of the chief protections of the freedom of speech and the press, and that it affords its greatest protection to attacks against the Church and State and public officials and figures.[1] To summarise the decisions of the Supreme Court which were discussed in the last lecture: a public official or a public figure may not sue in respect of a false defamatory statement unless he can show that it was made with malice : that is to say, with knowledge that it was false or made with reckless disregard of its truth. Where the false defamatory statement is made of a private individual, but in respect of a matter of public or general concern, there is a sharp difference of opinion : a bare majority in the court has held that an action will lie so long as a standard of strict liability is not imposed and so long as damages are limited to compensation for actual injury. This means that exemplary damages may not be given (at least where liability is not based on a showing of knowledge of the falsity of the statement or of reckless disregard for the truth) though the definition of the elements in actual injury is quite ample. Mr. Justice Douglas, who joined in the earlier cases with the late Justice Black, has insisted that the constitutional constraints imposed by the first amendment go further and he

1. Green: *Continuing the Privacy Discussion: A Response to Judge Wright and President Bloustein* (1967-8) 46 Texas L.R. 750 at p. 755.

would deny a right of action for defamation in all such cases without limitation. Justice Brennan would say that in all the areas covered by these cases : public officials, public figures and private persons in the course of discussion of or debate on matters of public or general concern, an action lies only on proof of malice, while Justice White, and it may be Chief Justice Burger, would oppose any qualification of established common law principles of liability in respect of actions brought by private persons. The poles are far apart. Justice Douglas says that continued recognition of the possibility of State libel suits for public discussion of public issues leaves the freedom of speech honoured by the Constitution a diluted version of first amendment protection.[2] Mr. Justice White as flatly declares that it is a near absurdity to devalue individual dignity as the majority does in *Gertz* v *Robert Welch* and to leave individuals who are neither officials nor public figures at the complete mercy of the press, at least at this stage of history when the press is steadily becoming more powerful and is much less likely to be deterred by threats of libel suits.[3]

It seems clear that the malice exception imposes very little danger of self-censorship and provides poor protection for a defamed plaintiff[4] In *Curtis Publishing Co.* v *Butts*[5], it is true that the plaintiff, a public figure, on appeal preserved his judgment for a large sum ; it was said that the evidence was ample to support a finding of highly unreasonable conduct on the part of the defendant. Viewed against the body of the case law, that case is likely to stand in isolation ; in *Gertz* v *Robert Welch Inc.* a spread of wildly abusive and defamatory statements was held not to fall within the malice exception. Justice Powell, speaking for the majority, said

2. *Gertz v Robert Welch Inc.*, (1974) 94 S. Ct. 2997 at p. 3016.
3. *Miami Herald Publishing Co.* v *Tornillo*, (1974) 94 S.Ct. 2831 at p. 2842.
4. *The Expanding Constitutional Protection for the News Media* Liability to Defamation (19) 70 Michigan L.R. 1547 at p. 1567.
5. (1967) 388 US. 130.

that there was no evidence that the Managing Editor of the magazine knew of the falsity of the accusations in the article, that he knew nothing of the plaintiff beyond what he learned from the article, and that mere proof of failure to investigate, without more, did not and could not establish reckless disregard for the truth. The publisher must act with a high degree of awareness of probable falsity and the evidence in the case did not reveal that the defendant, who was not the author, had such an awareness. It may be that a grounding in a different common law jurisdiction leads me to react strongly but I find this almost incredible. The journal itself was intensely partisan and the statements about Gertz were vicious, vituperative and far-ranging. To say that an editor has no responsibility for making a check in such a case denies recklessness a commonsense meaning; such a test would presumably have required the editor or author to pen the words himself without any check or regard for accuracy. When the syndicated American columnist, Jack Anderson, published widely and quite inaccurately the grossly damaging statement that Senator Eagleton, then a Vice-Presidential nominee of the Democratic Party, had been convicted of drunk driving, it was at best very doubtful whether the Senator under the *Sullivan* rule could have maintained an action for defamation.[6] Other cases support the view that the burden of showing malice is very heavy.[7] What is also to the point is that a plaintiff who seeks to prove malice or recklessness must undertake a formidable and very risky task : a defendant newspaper in such a case would be able to subject the plaintiff in public proceedings to a barrage of rumours and scraps of information and other material which it could, often with

6. Aspen *Notebook on Government and the Media* (Praeger 1973) at p. 161 "In the Anderson case, for instance, if Anderson had not chosen to retreat, and if he had some credible reason for saying what he said, there would have been no way that Senator Eagleton could have gotten an adjudication....that in fact this was wrong, a lie."
7. See *Faulks Report of the Committee on Defamation* Cmd. 5909 at pp. 168-9.

great resources, lay its hands on for the purposes of seeking to persuade a jury that this very narrow exception did not apply to it. A private plaintiff might well hesitate before embarking on a libel suit which would require him to submit himself to this.

In such cases, what other relief is available to a person, otherwise foreclosed by the defamation rules developed in these cases, to preserve and protect his reputation? Is it open to him to argue that "the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulations" ?[8] In some European legal systems, a Press Law stipulates a right of reply. Under German and French laws, there is a statutory right to compel an editor and publisher of an offending paper or periodical to publish in the next issue of the publication, or as soon as possible thereafter, a counter-statement or reply by any person who claims to have been defamed by untruthful or inaccurate statements. Such a reply must be given the same prominence and amount of space as the offending statement, and failure to comply constitutes a criminal offence.[9]

In *Miami Herald Publishing Co. v Tornillo*,[10] a Florida statute was framed in similar terms. It provided that where a candidate for nomination or election was attacked in respect of his personal character or official record by any newspaper, he was entitled to demand that the newspaper print, free of charge to him, any reply the candidate might make to the charges. The reply was required to be in as conspicuous a place and in similar type to the original charges, but subject to some space limitations. As in the European laws, failure to comply constituted a criminal offence. The Supreme Court of the United States held the statute unconstitutional. It was argued, and Chief Justice Burger summarized the argument

8. *Miami Herald Publishing Co. v Tornillo* (1974) 94 S.Ct. 2831 at p. 2836.
9. *Faulks Report* Cmd. 5909 at pp. 169-70.
10. (1974) 94 S.Ct. 2831.

at length,[11] that the claim to freedom of the press must be seen against the reality of the situation : that the concentration of press and media power often foreclosed free and meaningful debate, that the so-called market place of ideas was in fact a monopoly controlled by the owners of the market, and that access statutes of this type gave necessary relief in a situation of serious imbalance. While acknowledging the argument, the Court held the statute bad as an attempt to regulate the content of a newspaper, contrary to the terms of the first amendment. As Burger, C.J. said

> "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years. .....the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by the government to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which 'reason' tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated ..... Faced with...penalties...editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida Statute, political and electoral coverage would be blunted or reduced...the Florida Statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors... It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press."[12]

11. See *ante*.
12. (1974) 94 S.Ct. 2831 at p. 2838, 2839, 2840.

and White J. put it that

> "A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the exercise of journalist judgment as to what shall be printed."[13]

The issue of the constitutionality of a 'retraction' as contrasted with a 'right of reply' statute, affording plaintiffs able to prove defamatory falsehood a statutory right to require publication of a retraction was specifically left open.[14] *Tornillo* is an interesting and significant case in that it expressly acknowledges and recognises the problems of access in securing a meaningful and balanced freedom of debate on public issues, but the court unanimously denied the constitutionality of a law giving a right of reply. The scales are very heavily tipped in favour of the press and the media and it has been pointed out in support of an argument for a constitutionally protected right of access that it is the measure of the current standards of the media that ideas which normally would never be granted a forum are given serious network coverage if they become sufficiently enmeshed in mass demonstration or riot and violence. Too often ideas are denied admission into the media until they are first disseminated in a way that challenges and disrupts the social order.[15] *New York Times* v *Sullivan* and its progeny all appear to rest upon the assumption that the papers and the media are instruments of a vigorous public criticism and, for this reason, are to be shielded against defamation actions.

The Faulks Committee in the United Kingdom considered the case for a statutory *droit de response* to a defamatory

13. at p. 2840.
14. at p. 2840 per Brennan and Rehnquist JJ. "I join the Court's opinion which, as I understand it, addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory right to require publication of a retraction."
15. Barron: *Access to the Press—A New First Amendment Right* (1967) 80 H.L.R. 1641 at p. 1650.

statement appearing in a newspaper or other publication. It pointed out that it had made proposals for the extension of the categories of report attracting the defence of qualified privilege, and that in the case of specified reports and statements listed in the schedule to the draft bill prepared by the Committee, the availability of the defence would depend on compliance with a request by the plaintiff to publish at the defendant's expense and in appropriate manner a reasonable letter or statement by way of explanation or contradiction.[16] This had its origin in the English *Law of Libel Amendment Act* 1888, section 4, and was followed in the *Defamation Act* 1952. The New South Wales Law Reform Commission which reported in 1971 noted that there were other Australian statutory precedents for this course, but rejected it. It was said that it was unsound to treat the default as evidence of want of good faith because it gave an artificial probative effect to matter which might well, in the circumstances, have no probative value. Beyond this the Commission rejected the scheme of the English legislation under which the statutory protection was defeated if the defendant did not comply with the request. It said that for the purposes of defence, the default should not, in any event, be more than evidence tending to negative good faith; second, that a newspaper publisher or other defendant should not be obliged to publish a statement drawn up by someone else as the price of escaping liability for what must in any case have been a fair report, and third, that the cases considered by the Commission showed the provision to have had little use, since in those cases there had not been a real attempt by the plaintiff to make the appropriate request.[17] These reasons may vary in cogency, but they disclose the unwillingness of a strong Australian Law Reform Commission to adopt even limited statutory provision for retraction or explanatory statements.

The Faulks Committee, having accepted and adopted the

16. Cmd. 5909 of 1975 at pp. 58, 171.
17. Report of the Law Reform Commission on Defamation (No. 13 of 1971) at p. 119.

case for a *limited* statutory provision for explanation or contradiction, considered whether there was a case for a general extension of this obligation, thereby bringing the English law into line with European Press Laws. It concluded that this should not be done.

> "We have...decided against this as there is nothing really comparable in our law (in which the award of damages plays a much bigger part) with the Press Laws of the European countries referred to. We do not think a more general right to reply imposed by statute and affecting newspapers, broadcasters and other publishers could be introduced into our system of law without creating new criminal offences and punishments which we do not consider desirable in this field. Furthermore, we find objectionable a principle which entitles a person, who may be without merits, to compel a newspaper to publish a statement extolling his non-existent virtue."[18]

Stated on policy grounds, and without the burden of constitutional constraint, the Committee's view accords in general with that of the Supreme Court in *Tornillo*, save that, in particular cases, a defence to an action for defamation is available only on terms that a letter of explanation or contradiction is published. So the balances are differently struck in the European Press Law, in the law of the United States, and in the law, at least *lex ferenda*, of England.

While many commentators have extolled the doctrine of *New York Times* v *Sullivan*, there have been other American voices questioning it. I have quoted the words of Norman Podhoretz, the editor of the distinguished magazine *Commentary* deploring the truly astonishing privilege, enjoyed since the *Sullivan* case, of the press and television to libel with

18. See also the Working Paper of the New South Wales Law Reform Commission (1968) at p. 221. "We incline to believe that the obligation to publish a reply or correction at the instance of any person who is referred to, might lead to the conduct of publications being undesirably removed from the control of their publishers with effects on freedom of speech."

impunity, to lie with impunity and with equal impunity to invade the privacy of anyone whose privacy they chose to invade.[19] I confess to a strong sympathy with this point of view. I would suppose that those who would see in the *Sullivan* doctrine an occasion for dancing in the streets[20] would agree that it has some regrettable, not to say awful, spin-offs, but would assert that this price is worth paying for the assurance of greater freedom. The English law, and the laws of other Commonwealth jurisdictions, have viewed the matter differently. As Fleming puts it :

> "In contrast to American law, our law has steadfastly declined to sacrifice individual reputation to extravagant demands by the press for the privileged dissemination of so-called 'news'. Discussion of public affairs is sufficiently encouraged by offering...a defence for fair, if defamatory, comment upon true facts without going to the length of also condoning the dissemination of false defamatory facts... Our law does not esteem freedom of speech and of the press even in matters of public concern sufficiently high to clothe false statements of fact with qualified privilege let alone elevate it to a constitutional guarantee as in the United States."[21]

The question whether there should be a special press law in this sense has been considered in recent times by law reform commissions and committees in Australia and in the United Kingdom. The New South Wales Law Reform Commission, in an able and comprehensive working paper in 1968, declined to give support to the claim for special rights for newspapers "since, apart from the general undesirability of stripping the blindfold from the face of impartial justice, the idea of special responsibility for conveying matter important to forming opinion resting on a particular group is one, we believe, the general community would consider opposed to democratic

19. See *ante*
20. See *ante*
21. Fleming on *Torts* (4th ed.) at pp. 499, 512.

principles.[22] It is fascinating to compare the statements of principle and values in the American cases and writings and in this Australian statement.

In England, the Shawcross Committee proposed a new form of qualified privilege in its report on *The Law and the Press* in 1965. It recommended that there should be a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest, where the publication was made in good faith without notice, and was based on evidence which might reasonably be believed to be true, provided that the defendant had published on request a reasonable letter or statement by way of explanation or contradiction and withdrawn any inaccurate statements with an apology if appropriate to the circumstances. It is to be observed that this falls considerably short of the *Sullivan* rule, but even in this form it received a generally unfavourable response in England. It was debated in the House of Lords in 1966 and found little support there. It was questioned in some of the leading newspapers[23] and was subjected to careful and adverse criticism by Lord Lloyd. He characterized it as an extremely far-reaching proposal which meant that the Press would be entitled to put out untrue or half true statements about matters of public concern which could be justified in subsequent legal proceedings merely on the footing that they were based on evidence which might reasonably be believed to be true. Such evidence might cover rumours widely spread about, and which therefore could be said to have some semblance of justification. The plaintiff in such a case faced formidable difficulties in seeking to prove malice witthin the American rule; a defendant newspaper with large resources could dredge up all manner of stuff to persuade a jury that this was evidence which, though not true, might reasonably be believed to be true. Even if the plaintiff were successful in his action, his reputation would almost inevitably

22. at pp. 220-1.
23. See Lloyd: *The Law and the Press* (1966) Current Legal Problems 43 at p. 55.

be tarnished by the public pillorying to which he would be subjected. As Lloyd put it "the perils to which a plaintiff would be exposed by having to cope with a possible defence of this sort, if ventilated and exploited by all the resources which a vast national newspaper could command, leads one to ask what is the real foundation upon which the case is sought to be made by the Committee in favour of conferring so tremendous a new 'freedom' to assail public or private reputations."[24]

These proposals of the Shawcross Committee were also considered and rejected by the Faulks Committee. It was pointed out that they had a generally unfavourable reception in the debate in the House of Lords. The Committee opposed them for a variety of reasons : that while in theory they would benefit all classes of publishers, in practice they would place newspapers and broadcasting and television authorities in a special position. There was no case for creating such a position, and such defendants should not be entitled to protection in publishing false defamatory statements obtained from a source which turned out to be unreliable. Such a change in the law would seriously alter the balance of the law of defamation against a defamed plaintiff and this was "intrinsically undesirable".[25] The adoption of such a defence would add to the complexity, length and costs of defamatory actions and in many cases it could not work so long as newspaper and broadcasting authorities held to the principle of non-disclosure of confidential sources. Moreover, the general law of qualified privilege was available to press defendants where there was a common and corresponding interest in subject matter recognised by the law as being within the ambit of privilege. The Committee considered the argument that publishers were handicapped in their activities by the absence of this extra protection. As to this :

"We sought earnestly for such evidence, but very little

24. at p. 54-55. See also Heuston: *Recent Developments in the Law of Defamation* (1966) 1 Irish Jurist 247.
25. Cmd. 5909 of 1975 at p. 54.

was forthcoming, though we recognize that it may be difficult to find evidence so long after the event. In this context also we strongly agree with the statement of Lord Goodman, the Chairman of the Newspapers Publishers Association when he says—

> "The absorbing question is the one whether the present law prevents editors and publishers from printing material which ought to be printed in order to expose villainy and protect the public from villainy. I have heard this contention over many years and remain unrepentantly sceptical of its truth. A great newspaper—if it believes that some villainy ought to be exposed—should expose it without hesitation and without regard to the law of libel. If the editor, his reporters and his advisers are men of judgment and sense, they are unlikely to go wrong, but if they do go wrong the principle of publish and be damned is a valiant and sensible one for the newspaper and it should bear the responsibility. Publish and let someone else be damned—is a discreditable principle for a free press. Moreover, the frequent assertion that newspapers have in their archives hundreds of files which would reveal dreadful goings-on has never been established to the satisfaction of any conscientious writer."[26]

This contrasts rather sharply with the views expressed by the Editor of the Melbourne (Australian) *Age*, to which I referred in the last lecture[27] and which is frequently repeated in press criticism of the existing law of defamation. In its review of the American case law on defamation, the Faulks Committee noted that the decisions appeared to be founded mainly on the provisions of the American Constitution, while in England there were no constitutional constraints. The committee's comment on the American case law was brief but quite

26. at p.54.
27. see ante.

unequivocal. "No English witness who gave evidence before us advocated the adoption of the new American principle in this country. We oppose it most strongly because we believe that here it would in many cases deny a just remedy to defamed persons."[28] *The Times*, in editorial comments on the Faulks report considered this particular matter at some length : it said that while it believed that the committee underestimated the constraints which the present law of libel imposed on the genuine exposure of abuses, it should be recognised that the *Shawcross* proposal would seriously alter the balance of the law against the defamed person and that it was, in any case, hard to see how much use could be made of this defence unless journalists were prepared to divulge their sources, which they would presumably not be prepared to declare on those occasions when it mattered most. *The Times*' conclusion was that any relaxation of the law on defamation should apply to everyone without favour.[29] The New South Wales Law Reform Commission also expressly rejected the *Shawcross* proposal in its report in 1971.[30]

To sum up : over the last decade the American and English laws of defamation have diverged widely. The doctrines announced by the Supreme Court of the United States in *New York Times* v *Sullivan* and the cases which followed were not formulated as a body of law having specific application to the press and to the broadcasting and television media; they were expressed as applying to particular cases—those affecting public officials and public figures and the discussion of matters of public or general concern. In all of these cases, there was a very definite departure from common law rules which hitherto had been applied without apprehension of constitutional constraint. As a practical matter, the

28. Cmd. 5909 of 1975 at p. 169.
29 *Simplifying the Libel Law*: Times March 21, 1975.
30 Report of the Law Reform Commission on Defamation (No. 13 of 1971) at p. 109 "a man having no other defence should not, we think, be given a defence by reference to the tests of good faith, public interest and public benefit."

newly-announced application of first amendment principles has had a major impact in defamation cases affecting the press and the media. The English law, both as it stands and as considered by the Faulks Committee, will have nothing to do with a special *corpus* of press law, nor, specifically, with the doctrines announced by the American cases.

This is not to say that there is an insensitivity to the deficiencies of the existing law, and to these deficiencies the press, in particular, has insistently drawn attention. In very recent times, the Faulks Committee in the United Kingdom and the New South Wales Law Reform Commission (whose recommendations have been adopted as the Defamation Act 1974) have recommended substantial changes. They have approached the matter through substantive and procedural reforms, through recommendations for amendment to existing defences, through consideration of the law of damages and modes of trial. The principal common law defences are justification (truth), fair comment and privilege. At common law, justification, which was established if the defendant could show that the defamatory implications of which the plaintiff complained were true in substance and in fact, was a complete defence. Fair comment was a defence of especial importance to the press; as Birkett L. J. said in *Kemsley* v *Foot* "*it is an* essential part of the greater right of free speech. It is the right of every man to comment freely and honestly on any matter of public interest."[31] The defence protected broad, vigorous and far-ranging comment on matters of public concern. The law of privilege which, as I noted earlier, is concerned with the occasion rather than the content of a publication, spelled out the circumstances and cases in which the publisher of a statement, which could not be defended as true and which might otherwise give rise to an action for defamation, might claim protection. Privilege was absolute or qualified; if qualified, the common law rule was that the defence

31. (1951) 1 All E.R. 331 at p. 338. The Faulks Committee Cmd. 5909 of 1975 at p. 39 described the defence of fair comment as a bulwark of free speech.

was destroyed if the plaintiff could show that the publisher was actuated by malice.

In some common law jurisdictions, including some Australian States, the defence of justification (truth) had long been modified by the requirement that the defendant must also show that the publication was for the public benefit. This statutory qualification was introduced into the law in New South Wales in 1847, and it has been suggested that this may have been introduced in response to the particular conditions obtaining in the colony at that time, as a protection to former convicts who had expiated their crimes. It may indeed have been an expression of a more general idea that gratuitous destruction of reputation was wrong, even if the matter published were true.[32] The New South Wales Law Reform Commission recommended the preservation of the principle, but proposed an amendment to replace public benefit by public interest, a terminology better understood in the law of defamation, particularly in relation to comment. The issue of public interest was to be determined by the judge, not, as heretofore in the case of public benefit, by the jury. The Faulks Committee considered the matter in England where the old common law defence of truth had been preserved. It debated the desirability of adding the requirement of public benefit but, following the Porter Committee, rejected the proposal on the ground that it imposed too great a burden of uncertainty on an author or journalist, since he could not know in advance of an action how the issue of public benefit would be resolved. The common law deals in many general words and notions, and this reason for rejection is hardly convincing. It provides an interesting parallel to the reasoning of the Supreme Court of the United States in *New York Times* v *Sullivan* where it was said that it could not be relevant whether the statement concerning a public official was true or false; if such a qualification were introduced, the uncertainty of outcome would operate as an unacceptable constraint upon the freedom of authors and of publication.

32. Report of the Law Reform Commission on Defamation at p. 103.

In this aspect, the defence of truth has divergent characteristics in common law jurisdictions, and the less onerous English rule lightens the burden of defendants. It is generally agreed that the defence of truth should be *substantial* truth; that a plaintiff should not be able to defeat it by proof of minor error in a substantially true statement.

The defences of fair comment and of privilege are of great and obvious importance to the press. The defence of fair comment is inaptly titled; the word 'fair' misleads, since the cases show, and the principle demands, that what is protected is often intemperate and even unfair comment, and both the English and the New South Wales reformers would simply style the defence "comment".[33] It is generally agreed to be one of the unsatisfactory aspects of the development of the common law that the law and practice in respect of fair comment has developed a complexity and over-refinement of doctrine, and that there is need for statutory reform to set out clearly and as simply as possible the major principles upon which the defence rests. These are that the comment should be based on proper material: as, for example, a true statement of fact or a fair report of parliamentary proceedings, that the comment relates to a matter of public interest and that it should be either the genuine opinion of the author or, if it be in the form of a letter or article published in a newspaper, that the defendant newspaper published it in good faith. There have been oddities in this area of the law: such, for example, as the doctrine that a comment could not be defended if it imputed bad motives to a plaintiff. The thrust of law reform is to simplify the law, to provide a broad and clear base upon which the very necessary right of comment may be exercised.

The various committees and commissions which have considered the law of defamation in England and in Australia in recent times have also paid considerable attention to the

33. New South Defamation Act, 1974, Division 7; Faulks Draft Bill section 5 in Faulks Report at p. 236. See Faulks Report at p. 39.; New South Wales Report at p. 123.

law of privilege. The greater difficulties have been experienced with qualified privilege and an attempt was made in New South Wales by the Defamation Act 1958 to codify this area of the law. The Law Reform Commission in its report of 1971 pointed to the difficulties and uncertainties which had been experienced in interpreting and applying that Act, and broadly recommended a return to the common law, with such statutory modifications and additions as were seen to be appropriate in the interests of explicit statement. This was necessary, as both the New South Wales Commission and the Faulks Committee affirmed in the case of a wide range of reports of proceedings and activities. It was appropriate that protection should be given to such reports because of the educational and cultural importance of openness about the workings of political society and the manner in which freedom in reporting on such matters contributes to the idea of open society, as well as because of the importance which a particular item of news may have for the taking of future political or economic action. Such proceedings were the source material for information and discussion on current affairs, whether of politics, law, finance or other public concern.[34]

As in the American law, so in the common law rules with respect to fair comment and qualified privilege, malice destroys the defence. The law has had to struggle with this slippery concept in various places, and in the context of defamation the New South Wales Commission said that it had been a fertile source of difficulty and suffered from a diversity of senses commensurate with that fertility.[35] Both the Faulks Committee and the New South Wales Commission agreed that it was a term to be avoided and that the law both with respect to qualified privilege and fair comment should be rewritten to express the notion of 'proper use'. In the context of qualified privilege this may be expressed in terms that the defence would fail if the plaintiff could prove that the defendant in

34. New South Wales report at pp. 115-6.
35. ibid at p. 115.

making the publication took improper advantage of the occasion giving rise to the privilege; in the case of fair comment that the defence would fail if the plaintiff proved that the comment did not represent the defendant's (genuine) opinion.[36]

Central to the debate on defamation are the issues of damages and the role of the jury. Fox's Libel Act 1792 gave the jury the central role in the determination of the major issues in a libel suit and this was long seen as a safeguard for a free press and as a great victory for the liberties of Englishmen. In the contemporary debate it is seen very differently; the jury is seen by some critics as prejudiced against the press and too easily influenced by the inflammatory arguments of plaintiffs and their counsel. As the New South Wales Law Reform Commission phrased the point:

> "Amongst those who would prefer to see exemplary damages for defamation retained, the question tended to be examined in relation to defamatory matter in newspapers. A common approach was that many newspaper proprietors behaved badly in one way or another and that hence a newspaper did not merit any tenderness as regards damages for defamation. Newspapers were charged with many vices : among them were invasions of privacy, shallow reporting, inaccurate reporting, slanted reporting and appeals to the baser instincts of mankind in the shape of matter emphasising sex or brutality."[37]

It has been said that damages exercise a baneful influence in defamation in the shape of incongruously inflated awards; that awards in some cases are wholly disproportionate and leave the press unfairly vulnerable; that in comparison with awards for personal injury, damage awards for defamation are inflated, so that it may be cheaper to maim than to say

36. See Faulks Report at pp. 41, 63 ; New South Wales Report at pp. 114-5, 131-2. The word "genuine" does not appear in the New South Wales Defamation Act which the Faulks Committee had before it. That Committee recommended its insertion.
37. Report at p. 15.

unkind things.[38] A distinguished Australian judge has spoken of abnormally high awards of damages in libel cases in recent times.[39]

The arguments about damages raise important jurisprudential questions. It is said that damages can be justified only as providing compensation for material injury and are inappropriate for the grant of a *solatium;* damages cannot repair a sullied reputation or make good a shattered privacy. This goes far, and it is certainly not the law in other areas of tort liability. It is hard to see why, for want of any capacity to provide otherwise for reparation for very real though not physical injury suffered by a person, he should not properly be given a *solatium* of the only sort possible, a money award. The basis for the award of damages in defamation has been stated in a modern case in the High Court of Australia:

> Properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation...For this reason compensation by damages operates in two ways—as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a *solatium* rather than a monetary recompense measurable in money.[40]

In some cases it is argued that it is inappropriate to award any damages at all. Thus, in a case of unintentional defamation, and in particular in such a case where the defendant was not guilty of want of reasonable care, it was said by the Porter Committee in 1948 that if the defendant published an apology and correction, there should be no right to damages, and this was adopted in the Defamation Act 1952. There may be difficult procedural questions and some uncertainty as to what constitutes an appropriate apology and correction,

38. Fleming on *Torts* at pp. 520-1.
39. *Clines* v *Australian Consolidated Press,* 84 *W.N.* (*N.S.W.*) p. 1-2 at p. 105 per Jacobs J.A.
40. *Uren* v *John Fairfax & Sons Pvt. Ltd.,* (1966) 117 C.L.R. 118 at p. 131.

and the Faulks Committee drew attention to the need to reform this provision in some respects, but adhered to the central principle. So, too, did the Law Reform Commission of New South Wales in its report of 1971. There is substantial support therefore for the argument that in these cases of unintentional defamation, there should be no damages, but Lord Lloyd questions this: he points out that there may be many cases where an apology and correction will be entirely inadequate reparation for a grave and widely disseminated libel, and that such a provision may well create rather than avoid injustice.[41] There is substance in the point, but the trend is clearly against damages in such cases.

The sharpest dispute occurs at the other end of the spectrum, in the context of the award of exemplary or punitive damages for grossly defamatory statements and this has been described as a "vexed and controversial question."[41a] The theory of the award of exemplary damages is that they are given not to compensate the plaintiff for the hurt caused by the publication complained of, but to punish the defendant for wanton wrong-doing, and to mark the jury's sense of outrage at the conduct of the defendant. In a characteristic statement more than 30 years ago, Lord Goddard, then a Lord Justice of Appeal, put it that "the only way to punish people of this sort is to hit them in their pockets for they publish this sort of muck because it pays them to do it".[42] The defendant is appropriately punished even where economic loss seems slight because a gross libel inflicts a scar which the defamed person will have to live with.[43] Modern cases in the House of Lords, the High Court of Australia, the Privy Council and the Supreme Court of the United States have reviewed the propriety of the award of exemplary

41. Lloyd: Reform of the Law of Libel (1952) 5 Currently P. at p. 183.

41a Morison: Report on the Law of Privacy (Parliamentary Paper No. 85 of 1973, Commonwealth of Australia) at p. 13.

42. *Garbett* v *Huzell Watson & Vivey Ltd.* (1943) 2 E.R. 359 at p. 361.

43. Green (1967-8) 46 Texas L.R. at 450.

damages. The most recent decision of the House of Lords contemplates the possibility of such an award in a limited range of cases[44] and the High Court and the Privy Council would allow such damages[45] in cases in which the defendant acted in contumelious disregard of the plaintiff's rights. In *Curtis Publishing Co.* v *Butts*,[46] Butts maintained a judgment which included punitive (exemplary) damages on appeal in the Supreme Court of the United States. Harlan J., delivering the judgment of the court, did not accept an argument that the award of such damages constituted an effective prior restraint on publicaation in that it gave the jury power to destroy the publisher's business. As to this, it was observed that the first amedment gave the court control over an excessive award, but that there was no case for arguing for a constitutional inhibition on the award of punitive damages. "It is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards required for judicial protection... punitive damages serve a wholly legitimate purpose in the protection of individual reputation".[47] In *Gertz* v *Robert Welch Inc.*[48] the court held by majority that in action by a private individual, where the case involved comment on a matter of public or general concern, punitive damages could not be recovered, at least where liability was not based on a showing of knowledge of falsity or reckless disregard for the truth. The reconciliation of state law with a competing interest grounded in the constitutional command of the first amendment, required that a plaintiff who could not show malice in this sense should be confined to recovery for actual injury. This was, however, broadly defined to include impairment of reputation and standing in the community, personal humilia-

44. *Cassell & Co. Ltd.* v *Browne* (1972) A.C. 1027.
45. *Australian Consolidated Press Ltd.* v *Uren* (1969) 1 A.C. 590.
46. (1967) 388 U.S. 130.
47. at 161.
48. (1974) 94 Ct. 2997.

tion, and mental anguish and suffering.[49] The difficulty of proving malice within the terms of these cases makes it unlikely that a case for the award of exemplary damages will be established.

The trend against exemplary damages is reflected in recent reports and legislation. The New South Wales Law Reform Commission expressed itself as strongly opposed to such awards on several grounds : that it was inappropriate that one person should profit by the punishment of another, that if punishment was to be inflicted, it should be done by recourse to the criminal law of libel, that it was wrong that punishment should be inflicted in court proceedings which do not provide for the defendant the protection assured by the criminal law, and finally that it should not be a jury function to find a defendant guilty *and* to fix the punishment.[50] The New South Wales Defamation Act 1974 adopts the recommendation of the Law Reform Commission in abolishing exemplary damages. A similar course has been recommended by the Faulks Committee : while recognising that the cases hold that exemplary damages may be awarded in specified circumstances, the Committee states that it does "not like the idea of fining a defendant in a civil action and presenting the fine not to the State but to the plaintiff, who has already received aggravated compensatory damages for the injury to his feelings and damage to his reputation, the fine being in addition to the ordinary compensatory damages but included in those damages".[51] It is generally accepted, however, that the damages which may be awarded for defamation will still be 'at large', that it will still be open to the jury to award aggravated, substantial damages : such good sound substantial damages as will mark the jury's sense of the injury the plaintiff has sustained, and a jury may still properly think that a plaintiff who has been seriously defamed in a newspaper

49. at p. 3012.
50. Report at pp. 14-15.
51. Cmd. 5909 of 1975 at p. 96. And see Lord Reid in *Cassell & Co. Ltd.* v *Broome* (1972) A.C. 1027 at p. 1087, cited with approval by Faulks at pp. 96-7.

should have heavy substantial damages by way of compensation and quantify its verdict accordingly.[52]

The conclusion reached seems a sound one. So long as aggravated damages may be awarded, which I believe to be proper, it makes good sense to abolish exemplary damages. In a gross case, the processes of the criminal law of libel may be invoked, and both the New South Wales Commission and the Faulks Committee recommend that this criminal jurisdiction should be retained to deal with the outrageous case. I also believe that this is right.

The Faulks Committee goes further than its New South Wales counterpart in recommending restrictions on the use of the jury in defamation actions. While the New South Wales Commission would remit certain issues to the judge, such, for example, as the determination of public interest in the defence of justification, and would maintain the right of an appeal court in an appropriate case to set aside a grossly exorbitant jury verdict reached after proper directions, the Faulks Committee has recommended by a majority, and after extended consideration of very diverse views, that neither party should be entitled, as of right, to a jury in defamation action, but that a judge in his discretion might decide on application whether to grant a jury trial, either party having a right of appeal against such a decision to the Court of Appeal. The Porter Committee, while recognizing that jury verdicts were the source of large demands and awards, had declined to go so far. The Faulks Committee canvassed the matter at greater length, noting the general decline in the use of

52. Report of the New South Wales Law Reform Commission at p. 16 ; Faulks at p. 96 "We are of the opinion that in a proper case aggravated compensatory damages may be substantial indeed, and that simplicity and justice may satisfactorily be achieved by abolishing the concept of the fine, and stating clearly that damages for defamation are by way of compensation rather than of punishment." See also *Gertz* v *Robert Welch Inc.* 1974 94 S. Ct. 2997 at p. 3012. See also Stone : *Double Count and Double Talk* : *The End of Exemplary Damages* (1972) 46 Australian L.J. 311, and Morison, ante note at p. 13.

the civil jury, describing the case for its retention in defamation as "emotional",[53] and concluded that policy required that such actions should be tried as quickly and inexpensively as possible. This is reinforced by the recommendation that in any event the judge should fix damages after seeking guidance from the jury as to the scale of damages it had in mind. The jury should state whether in its view substantial, moderate, nominal or contemptuous damages should be awarded leaving the actual amount to be judicially assessed. This is generally in accord with Lord Devlin's recommendation in the fifteenth Annual Report of the Press Council, that if it proves impossible to put the law of libel as a whole on a more rational basis, a single enactment that damages should be fixed by the judge and not by the jury would bring a large measure of relief.

In these two lectures I have endeavoured to show that the law of defamation in its approach to the problems of adjusting and resolving competing claims to free and unconstrained publication and to the protection of fair repute has offered complex and diverse solutions, when one has regard to the law, both *lex lata and lex ferenda*,—in different jurisdictions. It is certainly the case that a central concern of the law should be the proper functioning of the news media in a democratic society. How one defines proper functioning and its limits has been a matter of sharp controversy and differing legal response. The responses have differed in the measures of protection to be accorded to publishers where matters of public concern are involved. The approach of the Supreme Court of the United States in *New York Times* v *Sullivan* and the cases which followed was to take the common law qualified privilege within a group as to matters of common interest, expand the group to cover all members of the larger community as to all matters of common or useful interest and to enlarge the privilege to cover all save knowing or reckless misstatements of fact.[54] This broad statement is

53. Cmd. 5909 of 1975 p. 139.
54. See Pedrick, *Publicity and Privacy : Is it any of our Business* (1970) 20 U. of Toronto L.J. 391 at p. 399.

qualified by the decision in *Gertz* v *Robert Welch Inc.* which, circumscribed and formulated at what, in my view, were appropriate limits to the enormous scope of the privilege. The English law and the law of other Commonwealth jurisdictions have declined to go so far. In other cases, as for example in respect of the *droit de réponse*, there are significant differences between common law and particularly European legal systems. It is conceded in many places that the law of defamation is in need of repair; in those jurisdictions whose law has been considered it is conceded that the press and the media have just cause for complaint that the law has developed complexity, uncertainty, technicality and delays and that the problems of damage awards and modes of trial and procedure require critical re-examination and appropriate reformation.

4

PROTECTION OF PRIVACY—1

IN 1890, TWO Boston lawyers, Samuel Warren and Louis Brandeis, published a joint article, *The Right to Privacy* in the very young *Harvard Law Review*.[1] That article is generally accounted one of the most influential, if not the most influential of all law review articles,[2] Roscoe Pound said that it did nothing less than add a chapter to the law. It was said to have been provoked by press publicity of which Warren and his family were the unhappy victims. It came at a time when, as the authors complained, a developing technology made it possible to intrude upon private lives and activities and to expose them to public gaze for reasons no better than mere titillation and vulgar curiosity. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops'..... The press is overstepping in every direction the obvious bounds of propriety and of decency"[3] The article argued the case for the recognition of a general right to privacy which was based on the principle of inviolate individual personality and which gave protection to individuals against the public exposure of their private affairs without their consent. It examined cases in which relief had been given on the basis of defamation, the invasion of property rights, implied contract and breach of confidence, to take examples, and argued that these were instances of the broader general principle. It was accepted that such a

1. (1890) 4 Harvard L.R. 193.
2. Kalven : *Privacy in Tort Law : Were Warren and Brandeis Wrong ?* (1966) 31 Law and Contemp. Problems 272.
3. ante note (1) at pp. 195-6.

general right to privacy was not and should and could not be absolute; the claim of the press to publish matter bearing on the lives and activities of individuals was entitled to appropriate recognition, and the formulation of a right to privacy required the striking of an appropriate balance between the interest in a free press and the claim of the individual to be let alone. The right to privacy protected the individual against unjustifiable exposure of his private affairs without his consent, against an exposure which inflicted "mental pain and distress far greater than could be inflicted by mere bodily agony."[4]

The sweep and the style mark out this article as an outstanding piece of advocacy[5] and its long-term impact was far-reaching. Courts and legislatures in various jurisdictions in the United States have fashioned common law and statutory remedies to provide protection in diverse ways for privacy, and these have recognized the need to strike appropriate balances and accommodations with contending interests. As I said in my introductory lecture, the success of the enterprise has been a matter of controversy. On the one hand, it has been said that a fairly well-balanced compromise has been achieved by adopting generally accepted community standards of civilised conduct as the criterion for prescribing the scope of legal protection;[6] on the other, that after a long period of development there is no readymade intellectually satisfying and workable concept or privacy law which can be taken from America and transplanted to other common law jurisdictions.[7] The Younger Committee which reported

4. at p. 196.
5. "What is unusual about the tort of invasion of privacy in the United States is that recognition of the interest in privacy (by Warren and Brandeis) preceded and was responsible for the development of the tort"—Swanton: *Protection of Privacy* (1974) 48 Australia L.J. 91 at p. 93. It has been called "the very point of learning" on privacy—Bloustein: *Privacy, Tort Law and the Constitution* (1968) 46 Texas L.R. 611.
6. Fleming: *Torts* (4th ed.) at p. 527.
7. Dworkin: *The Common Law Protection of Privacy*, (1967) 2 Tasmania L.R. 418.

on privacy in the United Kingdom in 1972 observed that while privacy is widely recognised as a legally defensible right in the United States, it is not established as a coherent principle of law and it has not significantly contributed to respect for privacy in everyday life, especially by the mass publicity media.[8] In a modern article, taking stock of Warren and Brandeis after three quarters of a century, the late Harry Kalven said that while privacy is an interest of profound and enduring importance, the arguments of the 1890 article were out of touch with the more robust tastes and style of contemporary life, and that the efforts to protect privacy through the law of tort was mistaken, since privacy had no "legal profile".[9] This view is sharply contested,[10] but it has commanded support in two recent major reports in the United Kingdom and Australia, both of which have declined to recommend a statutory enactment of a *general* right to privacy.[11]

It is generally agreed that, to this point, the common law of England and many other Commonwealth common law jurisdictions knows no *generalised* right to privacy. In *Tolley* v *Fry*,[12] the plaintiff, a leading amateur golfer of the day, brought an action against chocolate manufacturers who, without his consent, published an advertisement in the form of a caricature of him, with a packet of the defendants' chocolate protruding from his pocket. The plaintiff ultimately recovered in defamation; the House of Lords held that the publication carried the *innuendo* that he had prostituted his amateur status for gain and put his reputable club memberships at risk. This was a somewhat strained construction and one which the Court of Appeal had rejected. There Greer

8. Cmd. 5012 of 1972 at p. 30.
9. Kalven op cit ante note (2) at pp. 327, 333.
10. See e.g. Bloustein : *Privacy Tort Law and the Constitution : Is Warren and Brandeis' Tort Petty and Unconstitutional as Well ?* (1967-8) 46 Texas L.R. 611.
11. *Report of the Committee on Privacy Younger Committee, U.K.* Cmd. 5012 of 1972 ; Morison : *Report on the Law of Privacy.*
12. (1931) A.C. 333.

L.J. held that the plaintiff's case failed, since outside the area of defamation there was no other available remedy and he castigated the defendants for acting in a manner inconsistent with the decencies of life and said that they were guilty of an act for which there ought to be, but was not, a legal remedy.[13] The Porter Committee on Defamation which reported in 1948 noted complaints of press activities and reports which did not fall within the ambit of the existing law of defamation and said: "We think that there are great difficulties in formulating an extended definition of criminal or civil libel which, while effective to restrain improper invasions of privacy, would not interfere with the due reporting of matters which are of public interest... The offence is primarily against good taste, and if a legal remedy has to be created, it must, we think, lie in a sphere which is outside our terms of reference."[14] In the parliamentary debate on the first of the private members' bills on privacy introduced in the United Kingdom during the 1960's, Lord Mancroft's *Right of Privacy Bill 1961*, Lord Denning said that the law on privacy in the United States had evolved from the English common law and that in England "the judges may well do it. There is nothing in any decision of this House judicially, which prevents it, in that whenever any grievous cases come up, we find that the lawyers produce a remedy."[15] The English law has provided relief to the point of giving exemplary or aggravated damages on occasion[16] for intrusions on privacy, but *only* in the context of actions for trespass, defamation, breach of copyright and breach of confidence, to instance particular examples.[17] The Younger Committee commented that Great Britain has less in its law aimed *specifically* at the invasion of privacy

13. (1930) IKB 460 at p. 478.
14. Cmd. 7536 of 1948 at p. 10.
15. House of Lords Official Report 13 March 1961 Col. 639.
16. See e.g. *Williams* v *Settle* (1960) 1 WLR 1072. See Dworkin : *Privacy and the Press* (1961) 24 Modern L.R. 185 at p. 186.
17. See Report of the Committee on Privacy Cmd. 5012 of 1972 Appendix 1 at pp. 287 et seq.

than any other country whose law it had examined.[18] Lord Denning's statement in the debate on the Mancroft Bill was very much in character, but it is very doubtful if the common law of England would, at this time, recognise or announce a general right of privacy[19] and if changes are to take place in this area, outside the scope of existing remedies, it is certain that they will be accomplished by legislation. Moreover, as the Younger Committee noted, it is questionable whether a topic which is subject to such rapid changes in social convention as privacy can be regulated on the basis of case law, slowly built up, which would tend to reflect the values of an earlier period rather than of contemporary society.[20]

As in England, so elsewhere in the Commonwealth, there has been no common law development of a generalized right to privacy. In the Australian High Court, in *Victoria Park Racing Co.* v *Taylor*,[21] Latham C.J. said, almost forty years ago, that "however desirable some limitation upon invasion of privacy might be, no authority...shows that any general right of privacy exists." In that case, it was unsucessfully sought to restrain the broadcast of races from a platform erected outside and overlooking a racecourse. The case was a poor one to decide the *general* issue because the proprietor did not want privacy for his race meetings; on the contrary he wanted full control over the commercial exploitation of his undertaking. It might then be argued that the broad statement by the Chief Justice was not necessary to the disposition of the issue, and that the right of a plaintiff, whose interest is not the protection of a 'pocket book', but who genuinely seeks protection from surveillance and from disclosure of what that surveillance reveals, could be regarded as open.[22] That is very doubtful and the case is better re-

18. ibid at p. 28.
19 Swanton : *Protection of Privacy* (1974) 48 Aust. L.J. 91 at p. 97.
20. Report of the Committee on Privacy Cmd. 5012 of 1972 at p. 11.
21. (1937) 58 C.L.R. 479 at p. 496.
22. See Morison : *Report on the Law of Privacy* (Parliamentary Paper No. 85 of 1973, Commonwealth of Australia) at pp. 4-5.

garded as a general statement of the common law. It would take the boldest of lawyers and the richest of plaintiffs to reopen the matter.[23] The situation is very likely the same in India: Article 19(2) of the Constitution in preserving the operation of laws which impose 'reasonable restrictions' on the right to freedom of speech and expression assured by Article 19(1) specifically enumerates laws relating to public order, decency or morality, contempt of court and defamation. There is no mention of privacy and the reason is surely that Indian law had, to that point, developed no general right to privacy.

In recent times there has been much concern with issues of privacy. At the international level, Article 12 of the United Nations Declaration of Human Rights and Article 17 of the Covenant on Civil and Political Rights expressly provide that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence and that everyone has the right to the protection of the law against such interference or attacks, and other international conventions affirm a general right to privacy. One of the dissenting members of the Younger Committee argued that the failure of the committee to recommend legislation providing for a general right to privacy would leave the United Kingdom in default in its international obligations, since it was a party to United Nations and European conventions dealing specifically with the matter.[24] I have referred to the series of private members' bills introduced in the United Kingdom Parliament during the 1960's, which dealt with privacy issues. Lord Mancroft's Bill was concerned with privacy in the context of the media. Other bills have defined the right to privacy in very broad and general terms, while others have listed specified and diverse areas of conduct which are said to constitute breaches of privacy ; for example ; industrial

23. Goode : *Privacy : Disclosure of Private Facts* (unpublished thesis, University of Adelaide 1972) at p. 43.
24. D.M. Ross : *Report of the Committee on Privacy* Cmd. 5012 of 1972 at p. 213.

espionage, electronic surveillance and data banks. In the United States there has been a great volume of writing and substantial legislative investigation and enactment, of which title III of the Omnibus Crime Control and Safe Streets Act 1968, dealing particularly with wiretapping and electronic surveillance is the most conspicuous recent example. In Canada, at least two provinces have enacted Privacy Acts; in Australia, at Commonwealth and State levels, there is legislation relating to wiretapping, to electronic surveillance, data banks, and there are currently before State legislatures bills providing for more general rights to privacy. In the United Kingdom, the debate on Mr. Brian Walden's Bill in 1970 led to the appointment by the government of the Younger Committee whose terms of reference were to consider whether legislation was needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by *private* persons and organisations or by companies but the Committee was not authorized to enquire into intrusions into privacy by public authorities. That Committee, as I have said, reported in 1972. In that year, the Attorneys-General of the Commonwealth and of the Australian States commissioned a report by Professor W.L. Morison of the University of Sydney, with particular reference to the question of the protection of the privacy of individuals, having regard to the increased means of collecting, storing, retrieving and disseminating information.

In 1890, when Warren and Brandeis wrote, they saw contemporary developments in technology as posing a serious threat to the integrity of the inviolate human personality. The development and emergence of wiretapping procedures, of devices for eavesdropping and bugging, and the growth of information gathering systems has allowed vast masses of information to be collected in centralized and easily accessible locations, and freely and rapidly disseminated to other persons with a specific interest in the particular information. It has produced a situation in which the individual may find himself threatened and uncertain in a psychological prison

fashioned by a complex technology, not knowing when and by whom he is being watched or overheard. Two centuries ago Blackstone described eavesdroppers as those who listen under walls or windows or the eaves of houses to hearken after discourse and therefrom to frame mischievous tales; in our day, Justice Douglas reminds us that what the ancients knew as eavesdropping we know as electronic surveillance, but to equate the two is to treat man's first gunpowder as on the same level as the atomic bomb.[25] Whether as a matter of present danger or of potential threat, the individual may find himself manipulated and overseen by those who have control of a mass of computerized data relating to him which lays bare everything that he has done and is, and which may distort truth by recording false, inaccurate or incomplete information about him.

All of this, in the words of the Younger report, adds "a new and menacing dimension to familiar threats to privacy".[26] Warnings were uttered many years ago. In the latter 1920's, Brandeis as a Justice of the Supreme Court of the United States in *Olmstead* v *U.S.*[27] was concerned with the admissibility of evidence obtained by telephone wiretapping in a criminal prosecution. That case raised constitutional questions bearing on the fourth amendment to the United States Constitution relating to restraints on searches and seizures, and the admissibility of evidence obtained by means of such conduct. Justices Brandeis and Holmes, in dissent, held that the evidence was inadmissible. Holmes in a celebrated phrase characterized wiretapping as "dirty business". Brandeis went further; he anticipated the development of a technology which would give government the capacity to pry into the deepest recesses of the lives of individuals, and it was against this threat that protection had to be provided. His solution was to deny to government the fruits of its clandestine probes by declaring the evidence thereby obtained to be inadmissible.

25. *U.S.* v *White* (1971) 401 U.S. 745 at p. 756.
26. Cmd. 5012 of 1972 at p. 8.
27. (1928) 277 U.S. 438.

The principles which Brandeis asserted in dissent have since become established constitutional doctrine.[28]

There are further problems which arise out of the collection and dissemination of computerized information and here questions arise as to the appropriate procedures for controlling, regulating and checking the collection and flow of information relating to people. In the case of people beset by information gatherers, by importuning vendors and by others who, aided by a battery of technological devices, are able to batter at individual seclusion, there are problems of devising appropriate protective measures. There are increasingly detailed and intrusive investigations and tests of prospective employees by questionnaire, psychological and polygraph tests, which are more developed, it would seem, in the United States than elsewhere.

In all of this, the original matter on which Warren and Brandeis focussed attention should not be allowed to drop from sight. Advancing technology has enabled the media to make even more searching intrusions into individual privacy, and the reach of television, with the assist of the satellite, is formidable. The Younger Committee spoke of a growing tendency on the part of the media to engage in 'investigative journalism' and devoted a substantial part of its report to problems associated with the media. Edward Shils has written of the growth of a "new sector of the profession of journalism that regarded the penetration of the private spheres as its main occupational task. It justified this penetration by reference to the satisfaction of popular desires and the freedom of the press to enlighten the public".[29] It may be that it is not so very new, but it opens up important issues which we shall need to discuss in some detail. Then there is the pattern of modern urban life : the Younger Committee noted that from a wider point of view, concern for the protection of privacy has been stimulated by the growing pressures exerted by modern industrial society upon the home and daily life.

28. *Katz v United States* (1967) 389 U.S. 347.
29. Shils : Privacy : *Its Constitution and Vicissitudes* (1966) Law and Contemporary Problems 281 at pp. 293-4.

including such factors as the density of urban housing and the consequent difficulty of escaping from the observation of neighbours.

We need to preserve a proper perspective in estimating the impact upon privacy. Having set the scenario, the Younger Committee pointed out that the apparent loss of privacy through physical proximity in the massive conurbations of our societies may be more than offset by the anonymity of such life patterns, and the prying eyes of the small village community may be a more serious threat to privacy. The problems which arise from contemporary life styles may often be those of *anomie*, rather than of officious and intrusive oversight. It is also likely that the threats to privacy represented by the assembly of massive computerized data banks are potential rather than actual. While American writings make much of the present danger that these 'dossiers' represent in contemporary society, the Younger Committee noted that "the computer problem as it affects privacy in Great Britain is one of apprehensions and fears and not, so far, one of facts and figures"[30] and Professor Morison's estimate of the Australian situation was in substantial accord with this. He noted further that computer organisations displayed the greatest sensitivity to the possible effects on privacy of what they were doing and the utmost anxiety to see that privacy was fully protected.[31] My own participation in discussions on these matters confirms this. There are, however, serious and deeply-felt fears concerning the use to which such computer data banks may be put, especially in such fields as credit, medical and police records. There is certainly deep concern at the use of the battery of sophisticated devices available and constantly becoming available for surveillance and information gathering. Spectacular and widely publicized events add to the unease : the revelations of wiretapping, bugging and break-ins associated with Watergate have brought

30. Cmd. 5012 of 1972.
31. Report on the Law of Privacy : Parliamentary Paper No. 85, Commonwealth of Australia 1973 p. 51.

to many a new or renewed awareness of the scale and character of intrusions into individual privacy. In this context, as in others, the arguments do not all go one way : the debates on issues surrounding wiretapping and surveillance take into account problems of safeguarding the national security and of aiding the detection of widespread crime, at a time when apprehensions are felt about growing threats to public order and security.[32] The truth is, of course, that no one can claim that privacy can or should be absolute ; the very fact of living in society involves some sacrifice of it, and there is often a head-long collision between the individual's claim to privacy and highly-prized social values such as freedom of expression and the media and socially desirable objectives such as enforcement of the criminal law, efficient government and national security.[33]

The demand for legal protection for privacy, as Fleming points out in his treatise on torts, appears at a relatively advanced state of civilization, with increasing refinement in the social and aesthetic values of the community. It becomes more insistent as the intensity of modern life renders desirable some retreat from the world and as personal modesty, dignity and self-respect are increasingly exposed to practices which overstep the bounds of propriety. It is not possible, however, to give a simple answer to the question of the extent to which contemporary law gives (or should give) protection to the right of privacy.[34] In its broadest sense, the interest involved is that of 'being left alone' ; it was described by Justice Brandeis in *Olmstead* v *United States*[35] as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man". In the context of the 1890 article, the claim was to be free from unwanted and unwarranted intrusion and disclosure, in *Olmstead* to be free from surveillance by clandestine and unlawful wiretap.

32. See in the context of the United States Omnibus Crime Control and Safe Streets Act 1968.
33. Swanton : Protection of Privacy (1974) 48 Aust. L.J. 91 at p. 92.
34 *The Law of Torts* (4th ed. 1971) at p. 526.
35. (1928) 277 U.S. 438 at p. 478.

It is obvious that a legal right to privacy as broadly framed as this would be enormous in scope; it would mean, as has been said in an American context, that most constitutional civil rights would be details of the one true civil right, the right to privacy.[36] There is, however, support for a very broad definition of privacy in modern American cases. In *Roe* v *Wade*,[37] the Supreme Court of the United States held that a Texas abortion law could not prohibit voluntary abortions during the first three months of pregnancy. The majority expressly rested its decision on a constitutional right to privacy, and in a separate concurrence Justice Douglas said that—

> "This right of privacy was called by Mr. Justice Brandeis the right 'to be let alone'... That right includes the privilege of an individual to plan his own affairs for 'outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases'."[38]

In earlier cases, the court had held that as a consequence of the freedom to associate, assured by the first amendment to the Constitution, there was an associated *privacy* in such association, so that a State law could not require the National Association for the Advancement of Coloured People to reveal the names and addresses of Alabama members and agents, since the disclosure would expose them to economic reprisals and harm.[39] So too it was held on the basis of a constitutional assurance of privacy that a congressional sub-committee could not require a witness to disclose the political affiliations of other persons,[40] and in *Miranda* v *Arizona*[41] the Fifth Amendment privilege against self-incrimination in criminal cases was characterized as a right to a private enclave in

36. Gross : *The Concept of Privacy* (1967) 42 N.Y.U.L.R. 34 at p. 44.
37. (1973) 410 U.S. 113.
38. at p. 213.
39. *N.A.A.C.P.* v *Alabama* (1958) 357 U.S. 449.
40. *Watkins* v *U.S.* (1957) 354 U.S. 178.
41. (1966) 384 U.S. 436.

which a man might lead a private life. *Griswold* v *Connecticut*[42] was a striking modern case illustrating this development. The Supreme Court by a strong majority held that a Connecticut statute which made the use of contraceptive devices illegal was unconstitutional as a violation of a right to privacy. Justice Douglas, speaking for the court, said that specific guarantees in the Bill of Rights had "penumbras"; there were 'zones of privacy' created by various guarantees of the Bill of Rights and by previous cases decided by the court involving privacy elements. The state could not establish a legitimate social interest which was served by the challenged law. In *Stanley* v *Georgia*,[43] it was held that the state law could not constitutionally reach into the privacy of a man's home and punish him for the possession of obscene films. The abortion case, *Roe* v *Wade*, illustrates both the reach of the doctrine and its limitations. As Justice Blackmun, delivering the opinion of the Court, said:

> "The Constitution does not explicitly mention any right of privacy...(however)...the Court has recognised that a right of personal privacy or a guarantee of certain areas or zones of privacy does exist under the Constitution... This right of privacy, whether it is founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action...or the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy...a state may properly assert important rights in safeguarding health, in maintaining medical standards and in protecting potential life. At some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute."[44]

42. (1965) 381 U.S. 479. See also *Eisenstadt* v *Baird* (1972). 405. U.S. 438.
43. (1969) 394 U.S. 557.
44. (1973) 410 U.S. 113 at pp. 152-4.

State law could therefore reach out to prohibit abortions in the later stages of pregnancy; so such a broad conception of privacy there were still limits predicated upon countervailing social interests.

Justice Rehnquist, dissenting in *Roe* v *Wade*, questioned the constitutional principle. He found "difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case... A transaction resulting in an operation such as this is not 'private' in the ordinary sense of that word. Nor is the 'privacy' which the court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the court has referred to as embodying a right to privacy".[45] There is great force in this. Griswold has observed how, in such cases as these, the court moves away from the language of the Constitution. The first decision is distilled from the language of the Constitution, the next expansion begins from the reasoning of the last decision and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored.[46] It seems that the court in these cases has been using the term 'privacy' in a strained sense, and that what is in issue in cases like *Griswold* and *Roe* v *Wade* is the individual's autonomy or his interest in self-determination rather than his privacy.[47]

The Younger Committee argued that it was appropriate to narrow the definition of privacy; that while there was an element of privacy in the state of being let alone, it was not synonymous with privacy. An unqualified right of this kind would be an unrealistic concept, incompatible with the concept of society, which implies a willingness not to be let entirely alone and a recognition that other people may be interested and consequently concerned about us. If the concept were to be embodied into a right, its adaptation to the

45. (1973) 410 U.S. 113 at p. 172.
46. Cardozo Lecture : *The Judicial Process* (1972).
47. Swanton : *Protection of Privacy* (1974) 48 Australian L.J. 91 at p. 99.

dominant pressures of life would require so many exceptions that it would lose all coherence and hence any valid meaning. The Committee proposed a narrower definition for privacy which it saw as having two main aspects : one, freedom from intrusion upon oneself, one's home, family and relationships, the other, privacy of information, the right to determine for oneself how and to what extent information about oneself is communicated to others.[48]

How then do we reach a definition of the interests protected by the right or claim to privacy ? Seventy years after Warren and Brandeis wrote, Prosser in another landmark article which examined the American law found that there were four classes of case appropriately brought under the privacy umbrella. These were intrusions on a plaintiff's seclusion or solitude or into his private affairs, public disclosure of embarrassing private facts about the plaintiff, publicity which places the plaintiff in a false light in the public eye, and appropriation for the defendant's advantage of the plaintiff's name or likeness.[49] These classifications and particularly the latter two are repeated in definitions of privacy in modern Bills ; for example, in the Walden Bill in the House of Commons in 1969 and in recent Australian bills, but it is questionable whether all of them can be fitted coherently within a unified notion of privacy. To place a person in a false light intrudes upon his interests and in a very general sense may be said to infringe on privacy. While, however, there may be different senses in which a person may be placed in a false light, this generally may be seen as an aspect of injury to reputation, and therefore has its proper links with defamation rather than with privacy. There have been warnings about the way in which, in the United States in particular, the 'false light' aspect of privacy has been used to extend the scope of actions more properly connected with defamation.[50] In the German legal system, defamation has

48. Cmd. 5012 of 1972 at pp. 10, 19.
49. *Privacy* : (1960) 48 California L.R. 383.
50. Kalven : *Privacy in Tort Law*—Were Warren and Brandeis Wrong ? (1966) 31 Law and Contemp. Problems 326.

lost its identity as a separate tort and has become fused into the broader tort of the infringement of the right of personality, but this has not occurred, thus far, in the common law. The Younger Committee warned that "there could be a real threat to freedom of speech if the safeguards that have been built into the law of defamation were to be put in jeopardy by the process of subsuming defamation into a wider tort which is implied by the doctrine of 'false light.' We believe that the concepts of defamation and of intrusion into privacy should be kept distinct from another."[51]

There are some teasing and difficult problems associated with the relationships of defamation and privacy. To a civil action for defamation, truth is a defence; at common law the defence is truth, *simpliciter*, and the Faulks Committee did not recommend any amendment; to do so, it said, would introduce more uncertainty into the law. In other common law jurisdictions, there has been statutory amendment to superadd to truth a requirement to show public benefit or, more recently, public interest.[52] A central argument in support of the protection of privacy is that a person should be protected from unwarranted disclosure of true but private facts; the disclosures for which Warren and Brandeis and the laws which followed sought protection were publications of embarrassing private facts which were *true*. The consequence might be that a person might be denied recovery in defamation because what was published was not defamatory, or, being defamatory, was true, but could recover in an action for breach of privacy because the cause of action was of a different character. In one of the best known of the American cases, *Melvin* v *Reid*,[53] the plaintiff recovered in an action for privacy in a California Court. She had been a prostitute and stood trial for murder and was acquitted. She changed her pattern of life and years later this unhappy past was ex-

51. Cmd. 5012 of 1972 at p. 21. See also Taylor: *Privacy and the Public* (1971) 34 Modern L.R. 288.
52. Defamation Act, 1974 (N.S.W.).
53. (1931) 112 Cal. App. 285.

posed in a film. At common law she could not have recovered in defamation since the defence of truth would have denied it. If the defence of truth had been statutorily qualified by the requirement to show public benefit or public interest, it may have been otherwise. Protection against muckraking by exposing past and expiated delinquency was said to have been a major reason for amending the common law defence in this way. If the law of defamation were amended in this way, it is possible that a plaintiff in the circumstances of *Melvin* v *Reid* might recover in defamation or, in terms of the California law, for breach of privacy.

It is argued by press and media-men that the creation or recognition of a tort remedy for privacy imposes additional and unwarranted burdens upon their activities. They have long complained of an oppressive law of defamation, and if their rightful concern is to publish the truth, the action for privacy exposes them to a further and uncertain range of penalties, without any assurance of the protection of the defence of truth. This point was strongly made in the debate on Lord Mancroft's *Right of Privacy Bill* in 1961. That bill was specifically concerned with invasions of privacy by the press, film, radio and television; in its author's words, it was designed to strike a balance "between the essential freedom of the press and the equally essential rights of the individual".[54] It gave a right of action to an individual for unauthorized disclosure in these various media of 'any words relating to his personal affairs or conduct if such publication is calculated to cause him distress or embarrassment'. There were broadly framed defences of reasonable public interest in the matter published.

This very interesting piece of legislation commanded substantial and thoughtful support in the House of Lords. The Government, however, declined to support it, and the Lord Chancellor Lord Kilmuir formulated the objections. It was not possible, he said, "to define in an Act of Parliament

54. House of Lords Official Report 13 March 1961 Col. 607.

the circumstances in which ... a defence based on public interest is to be available without either destroying the effectiveness of the right of action or imposing a new and severe restriction on publication generally, and the freedom of the press. It would, no doubt, be possible for Parliament to leave it to the courts to decide in what circumstances a newspaper could successfully raise a defence of 'public interest'...(but this would confer)...in the courts a discretionary power so wide that it must, in effect, constitute them, in this field, virtual censors of the press. My own view is that such a course is neither acceptable nor desirable."[55] The same point has been made insistently by the press; in criticizing and opposing the Mancroft Bill, the *Manchester Guardian* said that if anyone was to be penalized for stating the truth, there must be some very compelling reason. Was it enough for the law to say that the truth may be told only if the subject matter was of reasonable public interest ?[56] The press has consistently attacked proposals designed to provide a general tort action for privacy; it has been said that in such circumstances journalists would be playing Russian roulette; such legislation has been described as a "threat to a free press". It is said that any such restrictions unless very clearly justified on other grounds are undesirable, and offend against the public policy which supports an unfettered press, allowing the free flow in information and comment which is essential to the health of any democratic state.[57] The draft privacy bill proposed by the United Kingdom National Council for Civil Liberties in 1970 specifically excluded the media from its operation.

There can be little doubt that the defence of public interest exposes wide areas of uncertainty. This emerges from a study of the American case law and commentators have spoken of the enormity of the counter-privilege which

55. House of Lords Official Report 15 June 1961 Col. 294.
56. Cowen : *The Private Man* at p. 25.
57. See e.g. The Advertiser (South Australia) 16 March 1974 commenting editorially on the Privacy Bill (South Australia) 1974.

leaves little of the grand design.[58] This was a powerful reason which led Kalven to argue that the attempt to secure privacy by a tort action was inappropriate; the tort, he said, has no legal profile.

In *Melvin* v *Reid*, it was held that the plaintiff could recover on the facts of the case for breach of privacy. In the leading and difficult case of *Sidis* v *F-R Publishing Co.*[59] the plaintiff's claim failed. Sidis had been a child prodigy driven by an intensely ambitious father. At a very early age he displayed remarkable mathematical talents and his achievements and activities attracted wide public attention. Sidis's story has been told by a happier and more successful prodigy, Norbert Wiener, in his book *Ex-Prodigy*. Sidis faded : he became a minor clerk with considerable proficiency as a routine calculator, and he lived an obscure life, shut away from the world, pursuing some odd and inoffensive hobbies. In 1937, as Wiener relates, Sidis's life became the object of a cruel and quite uncalled for article in the *New Yorker*. A reporter won his confidence and in an article under the title "Where are They Now ?" gave a detailed account of Sidis's life. Sidis, deeply hurt, brought an action for breach of privacy. The court said :

> "It is not considered that any of the matter printed is untrue. Nor is the manner of the author unfriendly... it may be fairly described as a ruthless exposure of a once public character who has since sought and now been deprived of the seclusion of private life".

Sidis was nevertheless denied a remedy. In the court's words :

> "William John Sidis was once a public figure... In 1910 he was a person about whom the newspapers might display a legitimate intellectual interest in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity. But the precise motives of the

58. Taylor : *Privacy and the Public* (1971) 34 Modern L.R. 288.
59. (1940) 113 F 2d 806.

press we regard as unimportant. And even if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity; but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled the early promise, was still a matter of public concern. The article in the *New Yorker* sketched the life of an unusual personality and it possessed considerable news interest... Regrettably or not, the misfortunes of neighbours and public figures are subjects of considerable interest and discussion to the rest of the population. And when such are the modes of the community, it would be unwise for a court to bar their expression in the newspapers, books and magazines of the day."

Norbert Wiener protests that it was outrageous that a man who had ceased to be news for almost a quarter century should have been pilloried in this way; the saga of the infant prodigy was not a live issue even in the public press and had not been so for a long time until the *New Yorker* made it so. It is a lamentable story; in the event it wrecked poor Sidis's life. In terms of the law, does not this decision, as Kalven says, expose the point that the exception of public interest eats the heart out of the tort action for privacy?[61] Is it possible to explain and reconcile *Sidis* and *Melvin* v *Reid*? It might be argued that what was in issue in *Melvin* v *Reid* was the destruction of reputation painfully and laboriously restored and then destroyed, whereas the disclosure of the different, but by no means dishonourable, present condition of a former prodigy was of a different order. Yet both produced deep hurt; both did great damage to the inviolate

61. Kalven : *Privacy in Tort Law*—Were Warren and Brandeis Wrong? (1966) Law & Contemp. Problems 326 at p. 337 speaks of "the enormity of the counter-privilege" exposed by *Sidis*.

individual personality, in Warren and Brandeis sense. It has been said that the cases can be distinguished on the basis that *Melvin* v *Reid* involved an intrusion into the present life of a private person by disclosing particular incidents of a public nature, whereas *Sidis* involved an intrusion into the present life of a celebrity by disclosing current incidents of a private nature.[62] This carries little conviction, and it cannot provide a convincing basis for a distinction. Ultimately, these cases expose the difficulties which a court must face in making its judgment in such a case. Why should it be the case, as Judge Clark said in *Sidis*, that Sidis's life was inescapably public ?

This is, of course, the substantial point made by Lord Kilmuir in the debate on Lord Mancroft's Bill, and it exposes the difficulties of which the press complain. Some cases present less difficulty. For example, in *Barber* v *Time Inc.*[63] plaintiff suffered from a rare disease which caused her to eat voraciously without any effect on her weight. Without her consent, the "starving glutton" was made the subject of a magazine article and picture by the defendant. The court held that she was entitled to recover in an action for privacy: it was said that while the ailment may have been a matter of some public interest because of its unusual character, the *identity* of the sufferer was not.

It is at best doubtful whether the public disclosures of family life and celebrations which outraged Mr. Samuel Warren and which were said to be the catalyst of the famous Warren and Brandeis article of 1890 would have given rise to a modern action for breach of privacy.

62. See Goode : *Privacy : Disclosure of Private Facts* (unpublished thesis, University of Adelaide 1972) at p. 85.
63. (1942) 348 Mo. 1199.

5

PROTECTION OF PRIVACY—2

IN THE CONTEXT of defamation, I have said that in *New York Times* v *Sullivan*[1], the Supreme Court of the United States declared that the first amendment to the United States Constitution required that debate on public issues should be uninhibited, robust and wide open ; it followed that false statements of fact would not give rise to an action for defamation unless they were made with actual knowledge of falsity or with reckless disregard of whether the statements were true or false. It gave expression to a judgment as to where the balance was appropriately struck as between the interest in the free circulation of information useful to society as against the interest in protecting private reputation. This judgment and this reading of the United States Constitution leads to a formulation of the law which is different from that of the common law of England and of other common law jurisdictions. There the balance is struck differently ; the interests of private reputation are seen as having a stronger claim to the protection of the law. *New York Times* v *Sulivan* was specifically concerned with an action for defamation brought by a public official ; the principle upon which it was decided might well have been, though as a broad one, embracing all issues about which information was needed or appropriate to enable members of society to cope with the exigencies of their period and such was a reasonable contemporary view of the decision.[2] In *Gertz* v *Robert Welch Inc.*,[3] however, the Court,

1. (1964) 376 US. 254 at p. 270.
2. See Pedrick : *Publicity and Privacy*: Is It Any of Our Business? (1970) 20 U. of Toronto L.J. 391 at p. 399.
3. (1974) 94 S.Ct 2997.

sharply divided, stated that the limits of the doctrine were narrower; while it might apply to public officials and public figures, the Constitution did not require its application to the case of private persons even though the matter in issue was of public interest.

This interpretation of the first amendment in *Sullivan* was not, in principle, restricted to actions for defamation. In *Time Inc.* v *Hill*,[4] the issue arose within the context of a statutory action for breach of privacy. In 1952, Hill and his family were held hostage for nineteen hours in their house by three escaped convicts and these events were given extensive publicity at the time. Hill did not seek or encourage this publicity; he refused all offers from the media to put the family in the spotlight, and the family moved house. Later a novel and then a play appeared based on these events, but departing in some respects from what actually happened. In 1955, *Life* Magazine published an article which recounted the family's ordeal and described the play as having re-enacted it, and this was accompained by pictures of the Hill family's house and of the associated events. There was a substantial discrepancy between what in fact had happened and what *Life* recounted in the article. Hill brought an action against the publishers under the New York Privacy Statute. Bringing it within this statute raised difficulties, and Pedrick describes the case as "Peculiarly malformed"[5] since the statute gave only a restricted right of action. It was designed to prevent the use without consent of a name, portrait or picture. As interpreted, it permitted publication about 'newsworthy' personalities, provided that the statements were accurate. The statements in *Life* Magazine were not accurate, and on this basis Hill brought action in New York and was awarded damages. The Supreme Court of the United States reviewed the case on the footing that constitutional issues relating to freedom of the press were involved, and *Hill's* case was

4. (1967) 385 U.S. 374.
5. Pedrick op cit note (2) at p. 397.

argued there by Richard Nixon, who had not long before been admitted to the New York Bar.[6]

A majority in the Supreme Court reversed the decision of the New York court and sent the case back for trial to determine whether liability could be established under the rule in *New Fork Times* v *Sullivan*. Justice Brennan, speaking for three judges, held that "the constitutional protections for speech and press preclude the application of the New York right of privacy statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth".[7] Justices Black and Douglas took their customary high ground holding that the freedom of the press assured by the first amendment, whatever the cause of action, was absolute. It is interesting to note that judges who in other areas, by way of the doctrines announced in such cases as *Griswold* v *Connecticut* and *Roe* v *Wade*, have asserted a constitutional right to privacy of breath-taking amplitude, have denied its possibility in cases in which first amendment questions are in issue. Three judges, Warren C.J., Clark and Fortas J.J., dissented on the ground that an individual was entitled to protection from the type of reckless invasion of his rights involved in this case and that "to immunize the press in areas far beyond the need of news, comment on public persons and events, discussion of public issues and the like, would be no service to freedom of the press".[8]

The facts of the case have led some to discuss it as an application of the "false light" category of privacy cases. The New York Statute, under which the action was brought, had been interpreted in such a way that Hill had to show the falsity of the *Life* report. This was why the case is malformed; the reality of the situation was that Hill complained of

6. ibid at p. 401.
7. (1967) 385 U.S. 374 at pp. 387-8.
8. at p. 420.

the public disclosure of what he claimed to be *private* facts, and he would equally have complained, had the law allowed it, of the publication of the true facts.

Time Inc. v *Hill* was decided before *Gertz* v *Robert Welch*, so that its holding would have to be considered in the light of that case. That is to say, in the context of privacy, as of defamation, if what is in issue is not a report or comment on the conduct or activities of public officials or public figures, but is a matter of interest bearing on the conduct or activities of private persons, the constitutional standards prescribed by the first amendment may be satisfied by existing statutory and common law rules on privacy. That would seem to be so as a matter of principle, but it has not yet been specifically decided.

Before *Gertz* v *Welch*, questions were raised as to whether the holding in *Time Inc.* v *Hill* had virtually torn the heart out of the action for breach of privacy; it was also questioned whether what was decided was an appropriate and necessary application of *New York Times* v *Sullivan*. If the test of newsworthiness is a factual one : that whatever is published is *ipso facto* newsworthy, and if this is the intent of the *Sullivan* case, then it would be difficult to find much constitutional scope for the operation of privacy law in this area. The commentators are divided : those who see little wisdom in the attempt to provide legal protection for privacy say, in this context, that newsworthiness will almost certainly be given a descriptive and not a normative operation.[9] Others argue that this is not, and should not be so : to define all that is published as newsworthy and consequently entitled to protection under the Sullivan rule is to fail to appreciate the real significance of the constitutional doctrine. It is designed to provide protection for the publication of matter relevant to the public purpose and interest; as Pedrick puts it "the line may not be an easy one to draw, but it defines the free-

9. Kalven : *The Reasonable Man and the First Amendment* : Hill, Butts and Walker (1967) Sup. Ct. Review 267 at pp. 283-4.

dom of the press in terms not of licence but of useful function—to provide information on the facts on which decisions can be made, attitudes can be formed, and an open society can grow and develop."[10] In the specific circumstances of *Hill*, it might be said that the publication of what happened, at or near the time at which it happened, might have been justified in the public interest since the event was relevant to such matters as the functioning of the penal system or the appropriate course to be followed by persons held hostage in such circumstances, but that a publication, with or without fictional glosses, two years or so later, was lacking in public purpose. If *Hill* had not arisen within the context of the distorting New York Statute, the issues might have been better exposed. Even if the *Hill* case is a difficult one for this purpose, other cases illustrate the point effectively. *Barber* v *Time Inc.*, discussed in the last lecture, is a good example . what public purpose was to be served by stating the identity of the "starving glutton" ? In *Melvin* v *Reid* what interest was served by making over the past and expiated delinquencies of Mrs. Melvin ?

This case, and the other cases we have discussed, point up the central issues of policy involved in the protection of privacy by a *general* statute or a general rule of law which affords a remedy to persons on the ground that their interests have been adversely affected by a disclosure which turns a private life into a public spectacle. This was the mainspring of Lord Mancroft's *Right of Privacy* Bill which was specifically concerned with and confined to violations of privacy by the media. Since that time in the United Kingdom and elsewhere in the common law world, statutes have been enacted

10. op cit at p. 405. See also Bloustein : *Privacy, Tort Law and the Constitution*—Is Warren and Brandeis Tort Petty and Unconstitutional ? (1968) 46 Texas L.R. 611 ; Nimmer : *The Right to Speak from Time to Time*—First Amendment Theory Applied to Libel and Misapplied to Privacy (1968) 56 Calif. L.R. 935 ; Goode : *Disclosure of Private Facts* (1972 Unpublished thesis, University of Adelaide).

and bills have been proposed in general terms to provide for the protection of privacy. These formulate the interests to be protected with greater or less particularity and also set out defences.

Thus the Privacy Act of British Columbia 1968 provides that it is a tort, actionable without proof of damage, for a person wilfully and without a claim of right, to violate the privacy of another. It goes on to provide that the nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others, and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, it provides that regard shall be given to the nature, incidence and occasion of the act and to the relationship, whether domestic or other, between the parties. It is further provided that without restricting the generality of these provisions, privacy may be violated by eavesdropping or surveillance whether or not accomplished by trespass. The act provides for a privilege to cover publications on matters of 'public interest'. A Canadian commentator on this Act observes that the definition of what is 'legitimate' in terms of a press in a democracy is a ticklish business. Whatever rules are laid down to prevent the invasion of privacy by the press should be capable of invocation by a private person pursuant to a civil remedy. The present laws of defamation are almost adequate and the person who comes voluntarily or involuntarily into the public eye is subject to limitations on his right to be let alone, within the boundaries of fair comment. But the person who leads 'a lawful and unexciting life' has a right not to be exposed to the public at least to the extent that this would be offensive or embarrassing to 'persons of ordinary sensibility' even if this falls short of the common law test of exposure to 'hatred, ridicule or contempt'. He judges that the British Columbia statute may achieve this "as completely as any statute can. The important things to remember are that the role of the press must be safeguarded and that gains in

privacy are not made at the cost of a free press".[11] The problem is, of course, the definition of the scope of the claim to 'freedom' of a 'free' press, and press interests are insistent that any general right of privacy statute places the freedom of the press in jeopardy and grave uncertainty, particularly so since truth in itself is not a defence. It was put graphically in the debate on current South Australian privacy legislation that the press would be playing Russian roulette. In such debates, the media, as affected parties, put their case very strongly and forcefully, and it is well for the interests of freedom that it is so. At the same time the comment of one of the members of the Younger Committee in the United Kingdom is apt. He argued that the Committee had allowed itself -

> "to be overwhelmed by the powerful and weighty evidence which the influential press interests presented to the Committee. The truth is that the press have always fought a strong rearguard action when it has been suggested that the press acts unfairly towards private individuals. In seeking quite legitimately to protect what they see as their best interests the press have always exaggerated the dangers of muzzling the press. The Press Council was only set up by the press after strong public pressure and I am bound to say that what I have learnt about the Press Council has not given me any confidence that it handles complaints with objectivity."[12]

He posed the critical question : If the right of the press to publish in the public interest is preserved, what is the loss to the press or the public if the press is precluded from *otherwise* invading the privacy of individuals ?

In his commentary on legal provisions for the protection of privacy, Professor Harry Kalven concluded that the attempt to provide *general* protection had been a mistake.

11. Edward F. Ryan : ***Report on Protection of Privacy in Ontario*** : Ontario Law Reform Commission, Dept. of the Attorney-General (1968) at pp. 80-81.
12. D. M. Ross Q. C. Cmd. 5012 of 1972 at p. 214.

He argued, on an overview of the law, that "we do not know what constitutes a *prima facie* case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional measures or includes also negligent invasions and even strict liability."[13] These do not seem to be insuperable objections and in my view, Kalven's criticisms have been fairly and convincingly dealt with by others.[14] The argument about damages is an odd one, and is not confined to privacy. We have seen that it has loomed large in the debate on defamation, and press interests in particular have claimed that threats of heavy judgments for damages are an obvious source of oppression. This has support from some judges and writers, though not all speak with a single voice.[15] What is more puzzling is the argument in both fields that damages are an *inappropriate* remedy for the injury complained of. Morison in his report on privacy prepared for the Australian Attorneys-General claims that the more intangible the interests protected by a tort, the greater is the problem of reducing the plaintiff's harm suffered to money terms. Such actions are likely to encourage gold digging, and the appeal to emotion by skilled advocates is calculated to distort judgment. These points have been argued at length in the area of defamation and recent reports have recommended the abolition of exemplary damages in defamation.[16] In the case of privacy, some draft bills have listed the elements which may appropriately be taken into account in assessing the damages to be awarded. Lord Mancroft's Bill provided that regard should be had to the conduct of the parties and to the distress or embarrassment suffered; other bills require consideration of the infringement on the health, welfare and financial position of the plaintiff and

13. *Privacy in Tort Law*—Were Warren Brandeis Wrong? (1966) 31 Law & Contemp. Problems 272.
14. e.g. Bloustein : *Privacy Tort Law and the Constitution* : Is Warren and Brandeis' Tort Petty and Unconstitutional as Well? (1968) 46 Texas L.R. 611.
15. see *ante*.
16. see *ante*.

any financial gain made by the defendant as a result of the infringement. The *Interim Report of the Law Reform Committee of South Australia Regarding the Law of Privacy* (1971) expressly stated that "a power ought to the inserted to allow the award of exemplary damages in a proper case", and the bill prepared in consequence of these recommendations makes express provision for the award of exemplary damages in a proper case. On the other hand, exemplary damages in a defamation are expressly abolished in the New South Wales Defamation Act, 1974, which followed a strong and elaborately argued recommendation of the Law Reform Commission of that State. Morison in his report on privacy observes that while the whole matter of exemplary damages in defamation is a vexed and controversial question, any injustice to a defendant in the award of such damages in defamation is likely to be much worse in privacy "where the rights which the defendant is said to have contumeliously disregarded are likely to be much more nebulous than they are in the old-established tort of defamation."[17] I confess to difficulty in understanding the argument that damages are somehow inappropriate in such areas as defamation and privacy and that there is something inappropriate in the notion of a money recompense for such injuries. Whether or not exemplary damages with their specifically punitive overtones are appropriate, it seems to me proper that in such cases damages should include those elements appropriately calculated in an award of aggravated damages.

Both the majority in the Younger Committee and Professor Morison in his Australian report—and both are major contributors to the study of privacy problems—opposed the enactment of a general tort provision for the protection of privacy. Their arguments stress the difficulties which courts would face in being required to enter too far into the determination of the sort of questions which would arise. The Younger Committee majority said that courts would face an

17. Report on the Law of Privacy (Parliament of the Commonwealth of Australia 1973 Parliamentary Paper No. 85) at p. 13.

"unguided choice in the light of the public interest, between values which in the abstract might appear to have equal weight".[18] In such an uncharted area, there would be formidable problems in striking acceptable balances between values implicit in the respect for privacy and other values of at least equal importance to the well-being of society. The tasks which would face the courts would be different in character and quality from those involved in the determination of negligence or defamation issues. "While it may be satisfactory to require the court or a jury to do this in cases where there are established community standards, as in ordinary actions for negligence which involve elementary safety considerations", Morison writes, "it is perhaps otherwise in an area where the community is rather struggling to establish stable standards against a background of rapid social and technological change".[19] The court would be frustrated by its extremely limited capacity to investigate, and matters would be so much at large that, for some substantial period of time, dicision-making would have a restrospective or *ex post facto* effect in each case. There were real dangers to freedom of expression in such a course; the extraordinary degree of discretion involved has, understandably, aroused great apprehensions which are reflected in the vehemently expressed opposition of press interests to such proposals.

The Younger Committee preferred to deal with specific areas in which substantial concern about intrusions into privacy had been brought to their attention. In some cases they proposed legislation, in others administrative controls and in others control by self-discipline. Legislation was proposed to create a new crime and a new tort of unlawful surveillance by the use of devices, and a new tort of publication of information obtained by unlawful means. This was designed particularly to deal with problems of industrial espionage which had been the subject of one of the private members' bills introduced into the House of Commons in 1968. Legis-

18. Cmd. 5012 of 1972 at p. 203.
19. *Morison* op cit at p. 12.

lation was also recommended to provide individuals with access to information held about him by a credit-rating agency. Administrative controls were proposed over credit-rating agencies and private detectives. It is interesting to note that self-discipline was the proposal for press problems. The Committee reviewed this matter at considerable length; it concluded that the appropriate course was to reform the Press Council by providing that one half of its membership should be drawn from outside the press. The reconstituted Press Council should have authority to consider invasions of privacy which would include unwarranted disclosures and intrusions and harassments. It should not have power to impose punishments, such as fines, awards of compensation or suspension of publication, but should be authorized to make critical adjudications which should be published with appropriate prominence. The Committee also recommended that the Press Council should explore the possibility of codifying and keeping up to date its adjudications on privacy in a form which would give readier guidance to the interested public.

It is fair comment that the recommendations of the Younger Committee were cautiously progressive and that they were "very gentle" with the Press.[20] Morison's approach was similar in that he favoured an examination of specific aspects of privacy problems, and central to his recommendations was the establishment of a continuing Privacy Committee which would receive submissions and conduct research so as to provide the necessary background information for the task of drafting appropriate legislation and for taking appropriate action to assure due protection for privacy. In this work it would be assisted by sub-committees in particular areas. Although he did not address himself in detail to press and media questions, Morison expressed the provisional view that a Publicity Media Sub-Committee would serve this area of privacy problems better than a Press Council. This was consistent with his repeated criticism of the Younger

20. Dworkin : *The Younger Committee Report on Privacy* (1973) 36 Modern L.R. 399 at p. 404.

Committee for referring particular matters to bodies whose interests and concerns were not exclusively those of privacy. It was appropriate to achieve effective results by establishing bodies and associated sub-committees which would develop a substantial body of expertise through their exclusive concern with privacy issues. Morison's recommendations have been adopted in his home state of New South Wales by the Privacy Act 1975.

Two dissenting members of the Younger Committee took the view that a general tort for the protection of privacy should be enacted. They supported the Committee in its recommendations for specific and hopefully effective sanctions against defined activities which unreasonably frustrated the individual in his search for privacy, but argued that a general provision would fill the gaps which this piecemeal approach inevitably left open. As noted, they drew attention to the obligation to implement international obligations to which the United Kingdom was a party, and they urged that the tort action had value in giving a remedy to the individual affected by the public disclosure of private facts and that it would serve as a deterrent to such acts and other privacy invading activities. Finally, they disagreed with the argument of the majority and of Morison that the vesting of such broad discretions in the courts was inappropriate, and argued to the contrary that this was very much in accord with common law traditions.

No one would argue that the provision of a general tort remedy should be the sole weapon in the legal armoury of privacy. The American cases certainly reveal the difficulties in the tort action and writers like Kalven have made much of this. It is the case that the counter-privilege is enormous; that it may be of an inherently expanding nature. It may be that the institution of an action for privacy will give rise to 'gold digging' actions, but this is true in other areas, and is an odd reason for denying it to those who suffer injury and who understandably and reasonably seek a remedy. The strongest argument against it, which is insistently made by

the press and by some civil libertarians is its uncertainty of operation and consequently oppressive character. The American experience would not suggest that it operates as a very powerful, some might say effective, constraint on free expression. On balance, I would support the view that it is desirable to include in the armoury of privacy provisions such a tort and this for the reasons argued by the minority members of the Younger Committee.[21]

Ten years ago, the *London Economist* noted that "there are only nineteen years left until 1984, but American electronic listening devices will meet the deadline easily." The reference to 1984 is to George Orwell's book of that title; it tells of a society in which an all-enveloping political organization had totally destroyed the individuality of its people; when simply by flicking a switch, Big Brother would know at any time what anyone was doing. There have been extraordinary technological developments : long ago it became possible to tap wires, and hence the telegraph and the telephone were vulnerable. It is said that wiretapping is about as old as the telegraph itself which made the wire useful as a source of information. As early as 1882, California made it an offence to intercept telegraph messages. By the 1890's in the United States the tapping of telephones by police and private persons for the detection of crime and for commercial and industrial espionage had become well established and attempts to curb it by law began early. Whatever legislation was enacted had but modest effect as an effective control; during the First World War and thereafter in the prohibition days, wiretapp-

21. See Swanton *Protection of Privacy* (1974) 48 Australian L.J. 91 at p. 97. See also Storey: *Infringement of Privacy and its Remedies* (1973) 47 Australian L.J. 498 at p. 509 : "I do not reject the concept of a general right of privacy, but on the whole it is my opinion that invasion of privacy in the areas of unjustifiable acquisition of information and disclosure of information are better dealt with in separate legislation. This still leaves the area of invasion of solitude and in my opinion there is scope for a general right of privacy designed to protect solitude and prevent intrusion upon the individual in circumstances where he might reasonably expect to be alone".

ing in the United States grew to the dimensions of a national scandal. Devices for tapping wires have been followed by a multitude of electronic surveillance devices which dispense with the need for the wire.[22] As Mr. Justice Brennan says, these devices add a new dimension to eavesdropping by making it more penetrating, more indiscriminate, more truly obnoxious to a free society.[22] The Watergate events exposed their extensive and cynical use with the connivance and participation of persons highly placed in Government and in total and cynical disregard of the law. This problem is not only an American one, and the Younger Committee devoted a chapter to modern surveillance devices, listing those of which they had been informed, and traversing a comprehensive range of legislative provisions in various countries, dealing with them.[23] In the United Kingdom, wiretapping gave rise to sufficient public concern to lead to the appointment of a Committee of Enquiry under Lord Birkett. This committee in 1957 published a report on the interception of communications which acknowledged the problem and characterized the practice as "an inherently objectionable one". The report did not recommend the total prohibition of tapping by public authority, but accepted the principle that security, customs, police and other public authorities should have power to tap in cases involving national security and serious crime. In Australia, legislation was passed in 1960 to control the interception of telephonic communication subject to quite narrow exceptions in the interests of national security. This was national legislation and since 1968 a number of State legislatures have taken action to control the use of electronic devices.

The impact of such surveillance upon the private lives of individuals may be very serious. By its very nature, it is practised covertly and, on any reasonably definition of privacy, it is a gross intrusion upon it. When practised extensively, so that a person is uncertain whether his conversations and activities are being overheard and overseen, it may have a formidable

22. *Lopez* v *United States* (1963) 373 U.S. 427 at p. 466.
23. Cmd. 5012 of 1972. Chapter 19, pp. 153 et seq.

and damaging psychological impact. As I have said elsewhere, the private man may find himself naked and uncertain in a psychological prison, not knowing when and by whom he is being watched or overheard.[24] This is true whether the surveillance is conducted by a private person for the purpose of securing evidence, for commercial or industrial benefit, or for mere titillation, or is practised by public authority in the interests of national security, the detection of crime or, as the evidence shows it to have been used, for general political surveillance. Judges with a sense of the corrupting element involved have spoken strongly about such surveillance, whether by wiretap or otherwise. The best known statement was that of Justice Holmes in *Olmstead* v *U.S.*; he spoke of wiretapping as 'dirty business'; and said that it was a lesser evil that some criminals should escape than that government should play an ignoble part.[25] In a recent case, another distinguished United States judge has said that "third party electronic monitoring subject only to the restraint of law enforcement officials has no place in our society. The burden of guarding privacy in a free society should not be on its citizens; it is the government that must justify its need to electronically eavesdrop."[26]

The Younger Committee was constrained by its terms of reference to consider only *private* intrusions on privacy; it was not authorized to consider the acts of public authority. Within these limits it recommended that unlawful surveillance by device, where done surreptitiously, should be a criminal offence; that in certain circumstances the advertising of devices for unlawful surveillance should constitute the offence of incitement to commit the main crime, and that there should be a new tort of unlawful surveillance by device for which damages could be awarded and an injunction granted. It also recommended, subject to certain defences, that it should be a tort, actionable at the suit of a person who had suffered

24. The Private Man at p. 31.
25. (1928) 277 U.S. 438 at p. 470.
26. *U.S.* v *White* (1971) 401 U.S. 745 at p. 790.

damage thereby, to disclose, or otherwise use information which the discloser knows or should have known was obtained by illegal means. In the United States, Title III of the Omnibus Crime Control and Safe Streets Act 1968, wholly prohibited eavesdropping or surveillance otherwise than by duly authorised law enforcement officers : thus it was made a federal offence for private individuals to manufacture, sell, advertise, distribute, transport or possess wiretapping and electronic devices designed primarily for surreptitious eavesdropping. This law is far-reaching, though the practical effect in terms of achieving the prohibition is open to question.[27] Legislation in four Australian States has dealt with the matter : the Acts follow a broadly similar pattern in prohibiting the use of listening devices without the consent of the parties, subject to exception in the case of specified public authorities and purposes. That is to say, the prohibition against *private* surveillance is absolute ; one State Act, like the United States Act, prohibits the possession of specified devices.[28] This regulation of the use of surveillance devices is seen specifically as a protection for privacy : the Attorney-General of Victoria in introducing the first of these Acts described it as "an instalment towards the establishment of a right of privacy... Such a right (he said) at present is somewhat tenuous. The decisions of courts of law in English-speaking countries have not gone far in affirming such a right. Furthermore, the legal remedies for enforcing such a right have not been very efficacious. Legislation to establish a general right of privacy and to provide remedies for its invasion would necessarily touch upon a wide range of subjects and might be very general and theoretic in character. It seems, therefore, more appropriate to make a prag-

27. Lapidus : *Eavesdropping on Trial* (1974) at p. 42-43: "Ineffectiveness of the ban on private eavesdropping may lend support to the claim of critics of Title III that the arguments which swayed members of Congress to vote affirmatively in the name of 'law and order' were a political hoax."

28. See Storey : *Infringement of Privacy and its Remedies* (1973) 47 Australian L.J. 498 at p. 510.

matic approach and to limit this legislation to the immediate objective of regulating the use of listening devices."[29]

There is substantial legislative agreement that the private use and exploitation of such surveillance devices should be prohibited. This gives expression to a policy that there is no justification for the surreptitious surveillance of private lives by persons not acting under warrant of public authority; that there is no valid countervailing interest to be considered. This appears to be plainly right. The more difficult question is whether there are valid and substantial countervailing *public* interests. The issue is well put by Senator Sam J. Ervin who came into recent prominence as Chairman of the Senate Watergate Investigating Committee, and who has long been concerned with these issues—

> "Of the issues of crime and liberty that have arisen in the past decade, one of the most difficult has been the question of wiretapping. It is, in the words of Justice Holmes, 'dirty business'. To eavesdrop on the private communications of others offends the sensibilities of all but the most callous. Yet a strong case exists for the use of electronic interception in crime fighting and in national security. However distasteful one might find it, the prevailing opinion seems to be that eavesdropping is necessary in law enforcement; it will be conducted legally if possible, but even illegally if necessary. The task then for both legislation and citizen is to decide whether to prohibit wiretapping entirely and drive it underground, as it was for so many decades, or to authorize it under specific circumstances and subject it to strict controls."[30]

Wigmore, the great American textwriter on evidence, countered Holmes's statement in *Olmstead* that wiretapping was dirty business by saying in effect that many things are dirty business; that one may have to defend oneself by acts which could be

29. Cowen : *The Private Man* at p. 31.
30. Foreword to Lapidus : *Eavesdropping on Trial* (1974).

described in just that way. The implications of this statement were that the need to control and detect crime justified the controlled use of wiretapping and eavesdropping. The arguments against it are familiar. Justice Douglas put it, in the context of a case in which the use of surveillance devices for internal security purposes was held unlawful, that "We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our forms of government".[31] President Lyndon Johnson gave expression to the same notion when he called for the outlawing of all wiretapping, both public and private, except where the security of the nation was at stake and only then with the strictest safeguards, and he called for the exercise of the full reach of constitutional powers to outlaw electronic bugging and snooping. There are arguments to the effect that there is no great profit in the attempt to strike a balance in this way between the claims of privacy and freedom on the one side and society's need for law and order on the other. The late Mr. Justice Frankfurter said that his deepest feeling against giving legal sanction to such 'dirty business' was that it makes for lazy and not alert law enforcement; that it puts a premium on force and fraud, not on imagination and enterprise and professional training. In testimony before a Senate Committee in 1967 the then Attorney-General of the United States, Mr. Ramsay Clark, said that he did not subscribe to a balance theory. He believed that there was a potential to enlarge simultaneously the public safety and the right of privacy and that the sound approach to the problem of policing crime was to devote adequate police resources to secure the public safety. Manpower devoted to wiretapping and electronic eavesdropping might be more beneficially used for purposes of public safety in other ways.[32]

31. *U.S.* v *U.S.D.C.* (1972) 407 U.S. 297 at p. 325.
32. Hearings, Sub-Committee on Administrative Practice and Procedure, Senate of the United States, April 4, 1967 at p. 56.

The Birkett Committee in the United Kingdom, which reported on interception of communications in 1957, recommended that security, police, customs and other public authorities should have power to tap in cases involving national security and serious crime. It has not been possible to form a judgment on what has happened in the United Kingdom since then, because the Government has refused to furnish statistics on telephone tappings. The Australian Telephone Communications (Interception) Act 1960 authorized interceptions for national security purposes when authorized by the Attorney-General on request from the Director-General of Security and there were additional emergency provisions authorizing the Director-General to act on his own initiative in particular cases. Subsequent Australian State legislation applying more generally to the use of surveillance devices authorises their use by police, security and customs officers. The American legislation, Title III of the Omnibus Crime Control and Safe Streets Act 1968, is the most comprehensive legislation of this character, and its adoption gave rise to a far-reaching and searching national debate in the Congress and in the nation. Up to this point of time, there had been more of a disposition to ban eavesdropping entirely rather than to permit it under restricted conditions. The 1968 Act, for the first time in American history, gave national authorization to surveillance by law enforcement officials, and was supported by overwhelming majorities in both Houses of Congress. It appears that the strong motive force was concern for law and order and an apprehension of the pervasive and baneful effect of 'organized crime'. Both the President, Lyndon Johnson and the Attorney-General, Ramsay Clark, expressed grave doubts about Title III, and the Attorney-General instructed federal law officers not to exercise their powers under the law, saying that he considered eavesdropping to be an invasion of privacy, and he questioned both its efficacy in law enforcement and the constitutionality of the 1968 law.[33]

33. Lapidus : *Eavesdropping on Trial* (1974) at p. 40.

The Act, as already noted, imposed a very comprehensive ban on *private* surveillance and on the means of conducting such surveillance. It authorized such surveillance by Federal and State officials acting in accordance with the provisions of the law. The normal authorization was by court order, while limited time emergency authorizations might be granted for specified public officers, and the President's constitutional powers to take measures in the interests of the national security were preserved. This latter power gave rise to sharp controversy and protest, particularly in light of statements by senior officers in the Nixon Administration as to their intention and purpose in the use of the power. The Government argued that the protection of the national security against internal organizations which threatened the use of force and other illegal means to attack the existing form of government justified the use of wiretap and surveillance devices. In *U.S.* v *U.D.S.C.*[34] a group, the White Panthers, were charged with conspiracy to destroy Government property and one Plamendon was accused of dynamite bombing of a C.I.A. office. The Attorney-General sought to tender evidence of conversations of the accused obtained by electronic surveillance and claimed that this was authorized under the 1968 Act as a measure taken in the interests of the national security. This was decisively rejected by the Supreme Court of the United States; it was held that what had been done violated the fourth amendment and that in such cases it was necessary to obtain a court order for electronic surveillance. As Justice Powell put it for the court, "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power".[35]

It is greatly to be regretted that the terms of reference of the Younger Committee in the United Kingdom foreclosed consideration of the issues involved in surveillance by *public* authority and the matter was not within the scope of the Morison enquiry in Australia. These two major reports are

34. (1972) 407 U.S. 297.
35. at p. 314.

therefore silent on this very important issue. In *Gobind v State of M.P.*,[36] the Supreme Court of India very recently explored the privacy implications of legislation authorizing comprehensive police surveillance in the interests of crime control. It found some difficulty in defining the essence and scope of the right to privacy and observed generally that

> "The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.
>
> ...Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

The Court, however, cautioned against over-broad grants of power of public surveillance which verged "perilously near unconstitutionality".

The wide ranging debate, and various investigations in the United States in recent years, have exposed very clearly the issues of privacy involved in surveillance activities conducted on a massive scale. The arguments which support the lawful conduct of such activities go to the interest of the national security and to the protection of society against crime. The 'law and order' arguments loomed large in the debates which led to the passing of the Crime Control and Safe Streets Act 1968. It is clear, however, that surveillance has been conducted on a massive scale without colour of legal authority; the miserable activities of Watergate dramatised this in pointing to the high official level at which they took place and were condoned. The Rockefeller Report, the Report to the President by the *Commission on C.I.A. activi-*

36. (1975) 2 S.C.C. 148 at pp. 157, 158.

ties within the United States of 1975 recorded a 'sorry litany of crimes and improprieties"[37] by operatives of the Central Intelligence Agency. This disclosed widespread resort by the agency to eavesdropping, surveillance and interference with the mails without authority of law and for a diversity of purposes including the oversight of political dissidents. Senator Frank Church called the report no more than "the tip of the iceberg"; more recent Congressional enquiry has brought to light further evidence of widespread surveillance activity conducted by governmental agencies, and what is desperately threatening is the development of technology for the conduct of surveillance. A national magazine reported recently on the development of a scientific capability for wholesale monitoring and Senator Church has warned that this technology "at any time could be turned round on the American people and no American would have any privacy left, such is the capability to monitor everything—telephone conversations, telegrams, it does not matter... I know the capacity is there to make tyranny total in America."[38]

It is a far cry from the simple provisions for police surveillance in *Gobind* but, as the court observed in that case, such surveillance, too broadly authorized, is objectionable, and the almost exponential development of surveillance technology undoubtedly puts personal privacy in grave peril. Senator Ervin has claimed that computerized files compiled by federal agencies threaten the establishment of a police state, and some part of the information in such files is obtained by eavesdropping. It has been said, further, that almost any form of invasion of privacy can be and indeed is defended on grounds of public interest, but the onus of justification must always rest on the person or authority claiming to exercise surveillance. The annihilation of all privacy might perhaps bring organised crime to an end. In the police state of George Orwell's imagination, the commission of a private crime was practically impossible, but the price paid was an

37. *Newsweek* June 23 1975, at p. 21.
38. *Newsweek*, September 8, 1975 at p. 41.

all-embracing public crime of such magnitude that freedom was totally destroyed.[39]

I refer, finally and briefly, to the issues involved in the compilation and recording of information in data banks and in particular in computers. As already noted, this is coming increasingly to the fore in contemporary discussion of privacy. It is given attention in specially significant contexts, notably in the area of the recording and supply of information relating to commercial credit, but the concern is general and goes to the collection and use of data for a wide variety of purposes by public authorities and other data bank operators. There has already been considerable legislative activity in various jurisdictions including the United States and Australia in respect of credit; legislative proposals have appeared on a broader front and there has been widespread debate. Professor Morison's study of the issues in his *Report on the Law of Privacy* to the Australian Attorneys-General is comprehensive, searching and particularly impressive. His examination of the Queensland *Invasion of Privacy Act*, in the particular context of credit collection and reporting, exposes the problems which may arise, and he draws attention to the "grim series of confrontations between the consumer and the credit agent"[40] involved. The powers of inspectors under the Act may themselves involve invasions of privacy. His examination of legislative proposals for control over computer data banks directs attention to the complex problems which may arise, and some of the discretions proposed for the exercise of control may make it possible "for a 'Big Brother' to emerge in society through legislation put forward in the name of protection of privacy as well as through failure to legislate to protect it"[41] It is clear that the issues call for close and continuing investigation, and also that the dangers of precipitate action, based upon a generalized fear of intrusion upon privacy, are serious and substantial. Both in the credit and

39. Cowen: *The Private Man* at p. 38.
40. Report at p. 37.
41. *ibid* at p. 55.

in more generalised fields, it is apparent that the costs of operators of personal data systems in complying with privacy regulations, and particularly with those which authorize persons to examine and to be supplied with information about themselves, may become very heavy. It has been said that "some privacy restrictions will render some systems or portions of them entirely infeasible or unjustifiably expensive especially those restrictions requiring that all proposed uses of personal data be authorized by the subjects in advance."[42] Cost, of itself, is not a conclusive argument against otherwise appropriate action, but it reinforces the need for care in the examination of proposals for legislation in an area in which, it is said, concern over the privacy invasion potential of computerized data banks is picking up momentum reminiscent of the environmental protection activities of a few years ago. We must not become latter-day Luddites.

42. *Personal Privacy* v *The Corporate Computer* (1975) 50 Harvard Business Review 62 at p. 70.

6

PREJUDICIAL PUBLICITY AND THE PROTECTION OF THE FAIR TRIAL—1

MORE THAN TWO centuries ago, it was said by Lord Hardwicke that nothing was more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor was there anything of more pernicious consequence than to prejudice the minds of the public against persons in causes, before the cause is heard. The law of contempt of court safeguarded such interests and Lord Hardwicke listed three different categories of contempt. One was scandalizing the Court itself. Another lay in abusing parties who are concerned in causes here. A third lay "in prejudicing mankind against persons, before the cause is heard".[1] The language is antique, but the issues remain live and in our day have occasioned very active debate and public concern. The assassination of President John Kennedy in November 1963 and the events which followed in its wake generated a searching debate on the issues of fair trial, particularly in the context of the limits of Press and media freedom, and also in the context of other influences, particularly those activities of law enforcement agencies and lawyers which might prejudice a fair trial. These events gave dramatic emphasis to the issue, though the debate in the United States has gone on for a long time. Almost three decades earlier it had been stimulated by the excesses of publicity culminating in the Hauptmann trial, the Lindbergh baby kidnapping case, which made many, including the American Bar Association, anxious about the effects and impact on the legal process of a torrent of prejudicial publicity. In recent times, there has been lively discussion of these issues in the United Kingdom. As in the United States, it has been fuelled by *causes célebres;* by

1. *Roach* v *Garvan* (1740) 2 AIR 469.

lurid cases like the murder trial of Dr. John Bodkin Adams which generated discussion and enquiry directed, in particular, to the propriety of the widespread publication of preliminary committal proceedings,[2] by the full and often sensational reporting of other cases which attracted wide public attention,[3] and more recently, and in very sharp focus, by the events surrounding the *Thalidomide* case. The issues raised in that case provided the opportunity, in the context of this problem, for a classic judicial debate on the limits of a free Press. The *Thalidomide* case passed through three English jurisdictions: the Divisional Court, the Court of Appeal and the House of Lords, and the views expressed in the three courts traversed many of the difficulties and the problems in this area of the law. While the *Thalidomide* case was under consideration, the Phillimore Committee on *Contempt of Court* was considering a variety of matters, to which these issues were central, and that Committee, noting that the *Thalidomide* case was the first in the law of contempt directly affecting the Press ever to go to the highest English court, delayed its report and recommendations until it had had time to consider and assess that case in light of the decision of the House of Lords.

The major issues with which we are concerned are those surrounding that category of contempt which is concerned with "prejudicing mankind against persons, before the cause is heard". Not only is that language antique, but the very terminology of contempt of court to describe the offence is itself historic and not altogether satisfactory. In the *Thalidomide* case,[4] Lord Cross expressed the opinion that the continued use of the contempt terminology in such cases was misleading in that it conveyed the impression that the concern was with a supposed affront to the dignity of the court, where-

2. See Cowen : *Some Observations on the Law of Criminal Contempt* in Sir John Latham and Other Papers (Oxford 1965) at p. 95.
3. *ibid*, at p. 94.
4. (1973) 3 All. E.R. 54 at p. 83.
See also *Johnson* v *Grant* (1923) S.C. 789 and *Report of the Committee on Contempt of Court* Cmd. 5794 of 1974 at p. 6.

as the central issue was the protection of the due and fair administration of justice. The Phillimore Committee agreed that the terminology was inaccurate and misleading, but because of long and ancient usage, and for want of a suitable alternative, chose to use contempt as "convenient shorthand" in dealing with this branch of law. In his famous classification of contempts, Lord Hardwicke had also listed 'scandalizing the court', and there is a long-established body of law concerned with this area of contempt, which merits brief reference. At the end of the last century it was said by the Privy Council in *McLeod* v *St. Aubyn*[5] that the jurisdiction, so far as it contemplated punishment for criticism of judicial performance, was obsolete and that it was better to leave such matters to the court of public opinion. That forward-looking view proved to be premature; within a very short time thereafter, an English court punished as contempt a criticism of a judge sitting as assize judge.[6] Subsequent history shows that the jurisdiction remains alive and there are English and Australian[7] and Indian[8] cases which affirm it. There have been apt warnings of the need for moderation and proportion. It has been wisely said by one of the great English judges that "the path of criticism is a public way: the wrongheaded are permitted to err therein... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".[9]

This aspect of the law was considered by the Phillimore Committee. While observing that the last successful resort to a court to punish for contempt on this ground was more than forty years ago, and that there was not much evidence that the Press was unduly inhibited thereby, the Committee also noted

5. (1899) A.C. 549.
6. *R.* v *Gray* (1900) 2Q. B. 36. See a contemporary criticism in Hughes: *Contempt of Court and the Press* (1900) 16 L.Q.R. 292.
7. See Cowen *op cit* at pp. 72 et seq.
8. See *Public Law Problems in India* (ed. Ebb, 1957) at pp. 104-5.
9. *Ambard* v *Attorney-General for Trinidad and Tobago* (1936) A.C. 322 at 335, *per* Lord Atkin.

that criticism had become more forthright in recent times, particularly in areas of sensitivity and intense feeling such as industrial relations, as in the case of the National Industrial Relations Court. In general, the Committee's conclusion was that such comments and attacks were better ignored, partly as an acknowledgement of a changing climate of opinion. The Committee recorded the view of the Lord Chief Justice, Lord Widgery, as stated to the Committee, that "Judges' backs have got to be a good deal broader than they were thought to be years ago". It was thought appropriate, however, to preserve a remedy in this area to protect the administration of justice and especially the preservation of public confidence in its honesty and impartiality, and to assure some legal remedy in appropriate cases since judges, unlike other citizens, had no other practical and effective recourse to law. The proposal was to replace this branch of the law of contempt by a new and strictly defined criminal offence triable only on indictment and constituted by the publication of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice.[10]

In the United States, the law is very different. Justice Douglas has put it characteristically that : "We have made our choice, refusing to sacrifice freedom of the Press to the whims of judges. We know that judges as well as editors can be tyrants"[11] and in *Pennekamp* v *Florida*,[12] the Supreme Court of the United States reversed a State court conviction for the publication of articles attacking judicial integrity and performance. In *Garrison* v *Louisiana*,[13] the Supreme Court reversed a conviction for criminal libel for sharply critical statements on the motives and abilities of county court judges. In this case, the court applied the rule of *New York Times* v

10. *Report of the Committee on Contempt of Court* Cmd. 5794 of 1974 at p. 70.
11. *The Public Trial and the Free Press* 46 A.B.A.J. 840 at p. 841.
12. (1946) 328 U.S. 331
13. (1964) 379 U.S. 64.

Sullivan,[14] regarding judges as public officials within the ambit of that rule.

The difference between the English and Commonwealth law on the one hand, and the law in the United States on the other, is strikingly exhibited in a range of cases. In the *Thalidomide* case,[15] Lord Morris put it that "the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted." The differing approaches of the English and the American courts are well stated in *Delaney* v *United States*.[16]

> "How best to protect accused persons from the prejudicial effect of newspaper publicity has been a matter of immense concern. In England, such publicity is largely curbed by the free use of the power of the courts to punish for contempt... In this country the course of treatment has been different. So far as the federal courts are concerned, there are important limitations upon the power to punish summarily for contempt. See U.S.C. 401... More fundamentally, it has been thought that this modern phenomenon of 'trial by newspaper' is protected to a considerable degree by the constitutional right of freedom of the Press... On this view there has been some fatalistic acceptance of 'trial by newspapers', however unfortunate, 'as an unavoidable course of metropolitan living (like, I suppose, crowded subways)'... The courts are then limited to doing what they can to insulate jurors from the prejudicial effect of such publicity, as by cautioning instructions, or by the granting of continuances, or in some cases granting a change of venue. Perhaps the Supreme Court has not spoken its last word upon this vexing problem."

As to the palliatives, such as cautioning instructions, that is to say, instructions to the jury to disregard such pre-

14. (1964) 376 U.S. 254.
15. (1973) 3 All. E.R. 54 at p. 66.
16. (1952) 199 F. 2d 107.

judicial matter, we have the characteristic comment of the late Mr. Justice Jackson of the Supreme Court of the United States, to the point on this as on so many other matters, that "the naive assumption that prejudicial effects can be overcome by instructions to the jury...all practising lawyers know to be unmitigated fiction".[17] The other palliatives do little to meet the problem.

There is, however, a more difficult question. It is assumed that such publicity is in fact prejudicial to a fair trial. A Press-Bar Committee of the American Society of Newspaper Editors has put it that convincing or even credible evidence of the degree to which Press coverage of criminal proceedings impairs the chances of fair trials for defendants is almost totally lacking. In argument on the issue, the standard pattern has been to derive sweeping conclusions from the most incomplete, fragmentary and isolated sets of facts. In the whole study of American jurisprudence, it was said, there was no competent demonstration of which the committee was aware of the impact of pre-trial and trial publication on the minds of jurors. The most extreme differences of opinion about such effects occur, remarkably enough, among judges themselves. One could suppose from the literature in the field that about half of the judges who have spoken on the matter believe that jurors cannot remain objective once they have read about a case while the other half conclude that jurors render their decisions almost exclusively on the basis of the evidence they hear in court, regardless of their knowledge about or attitude toward the case before they enter the jury box.[18] This point emerged in an extended discussion on the *Fair Trial-Free Press* issue in which I took part in 1965, in the aftermath of the Kennedy assassination and the publication of the *Warren Report on*

17. *Krunewitch* v *U.S.*, (1949) 336 U.S. 440 at p. 453.

18. *Fair Trial* v *a Free Press* (Occasional paper published by the Center for the Study of Democratic Institutions 1965) at pp. 3-4.

the Assassination of the President.[19] The Phillimore Committee also considered the matter. After observing that in the case of trials by judges, such publication, though embarrassing, was not of sufficient force to require the protection of the law of contempt, the Committee considered the case of jury trials.

> "The extent to which jurors may be affected by prejudicial matter is a more difficult question. No doubt it varies from one juror to the next. Very little research has been done into the question of what moves juries to reach their verdicts. Most people have private prejudices of one sort or another, for example, in respect of particular types of crime or a particular class of defendant. Much of the law of criminal evidence is based on the assumption that juries are more open to prejudice than professional lawyers in that they do not have the training and practice of lawyers in taking account only of strictly relevant matters. On the other hand, it would be wrong to underestimate the capacity of juries to put extraneous matter out of their minds."[20]

The difficulty is that we are at a loss here, as in so many areas where the truth or falsity of factual consequential statements has to be determined, and there is a question as to the capacity of the methods and instruments of social science to do so. There are such problems in the areas of obscenity and portrayal of violence. Mr. Justice Holmes once said that no woman was ever seduced by a book and while this may be accepted as an article of faith, it is difficult to establish by reference to empirical data. In a study of *Violence, Pornography and Social Science*, the findings of two United States presidential commissions on the *Causes and Prevention of Violence* and on *Obscenity and Pornography* were that violence in television can and does have adverse effects on audiences, particularly child audiences,

19. *Report of the Warren Commission on the Assassination of President Kennedy* (1964).
20. *Report of the Committee on Contempt of Court* Cmd. 5794 of (1974) at pp. 22-23.

whereas exposure to or the use of explicitly sexual materials played no significant role in leading to crime, sexual and non-sexual deviancy, or disturbance. The author of the study subjected the data on which these conclusions were based to critical analysis, observing that significant legal consequences might flow from their acceptance. His conclusion was that "social science probably cannot answer the questions put to it by those who wish to rest the case for or against censorship on the proved effects of exposure to obscenity, media violence, scurrilous political literature or whatever".[21] The point is that there are too many variables: general social environment, the differences attributable to social class, intelligence and family structure, all of which may profoundly affect the attitudes and responses of individuals. On such issues, ultimately, the judgments about the acceptability of restrictions on various media will have to rest on political and philosophical considerations.[22]

This takes us some way out, but it bears on the problems with which we are concerned in these lectures. Perhaps the argument in support of constraints on prejudicial publicity and activity, or more specifically in support of the argument that such publicity and activity is prejudicial, is that it makes little sense to formulate and apply exclusionary rules of evidence in the court-room if those rules are liable to be defeated by publication of the matter that has been excluded. This in turn invites questions as to the soundness of the evidentiary rules themselves: if the theory of the rules is the danger of prejudice, questions bearing on the lack of empirical demonstration of prejudice apply to the rules of evidence as they would to the effect of publicity. Even if the best that one can do is to speak in terms of the *possibility* of prejudice, the question raised by United States Federal Judge Will has much force: "Why ... should we have to tolerate the mere possibility of a contaminated panel of

21. *The Public Interest* No. 22 *Winter* 1971 at p. 57.
22. See Cowen: *From the Trial of Lady Chatterly to the Trial of Oz* (Australian School Librarian, December 1971 Supplement) at pp. 14-15.

jurors when there is so little demonstrable benefit which flows from the disclosure of such information and so much potential harm which may be inflicted on the defendant, the public and the administration of justice ?"[23] While decisive proofs are not and cannot be forthcoming, the judgment of English and Commonwealth courts is that there should be constraints on such publication and publicity and the conclusion of the Phillimore Committee is that, in carefully and cautiously prescribed conditions, there should be such constraints, though "in the interests of personal freedom, especially freedom of speech, it is not possible or even desirable to attempt to protect the course of justice completely from all outside interference. Those concerned in legal proceedings, whether as judges, jurors, witnesses or litigants, cannot be wholly insulated from the contacts and pressures of everyday life in the community. On the other hand, the need for some degree of protection is clear. A balance must be achieved which is not only as fair and certain as possible in its application, but also takes account of the practicalities of the situation".[24] The American courts, while they have gone far in denying the application of contempt laws, have reversed convictions on the ground that prejudicial publicity surrounding the events and trial denied to accused persons a trial satisfying the requirements of constitutional due process.[25] And notwithstanding their question of proof of prejudice, the Committee of the American Society of Newspaper Editors concluded that even "if there is scant evidence that this right (of fair trial) is diminished by prejudicial publicity for more than a handful of defendants each year, that is a handful too many, and the Press must not seek to evade any necessary corrective action on grounds that it causes injury only rarely."[26]

The modern English and Commonwealth cases have

23. *Fair Press* v *Fair Trial* (1963) 12 De Paul L.R. 197.
24. *op cit* at p. 28.
25. See e.g. *Irvin* v *Dowd* (1961) 366 U.S. 717.
26. Cowen *op cit* note (18) at p. 5.

tended to articulate the policies in such cases in a way which acknowledges the need for balance. These issues have been well set out by a Canadian judge in terms that

> "In many cases the Press renders great public service by the publication of reports of events surrounding the commission of a crime or an alleged crime and it is no function of the courts to act as censors of the Press, but it is the function of the courts scrupulously to preserve the rights of an individual to a fair trial and to see that there shall not be any trespass on the right by the publication of reports that are calculated to interfere with it".[27]

Earlier cases had formulated the rules very firmly and plainly. More than seventy years ago it was stated that the reason why the publication of articles like those dealt with in that case were treated as contempt of court was because their tendency and sometimes their object was to deprive the court of the power of doing that which was the end for which it existed—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency was to reduce the court, which had to try the case, to impotence, so far as the effectual elimination of prejudice was concerned. An American writer charting the course of English contempt law described it as "frightening to one who is reared in the climate of a free wheeling Press"[28] and as a "Draconian control over Press coverage of trials to keep the 'stream of justice' pure".[29] There has been no hesitation on the part of the courts to use the contempt power in cases which they regard as being clear, and no reluctance to impose severe punishments. One of the most celebrated of comparatively modern cases was *R.* v *Bolam*.[30] A widely circulated English daily newspaper published statements referring to a man who had been arrest-

27. *R* v *Steiner* (1955) 114 CCC 117 at p. 120.
28. Goldfarb: *The Contempt Power* (1963) at p. 88.
29. Goldfarb: *Ensuring Fair Trials: The Impropriety of Publicity* New Republic February 29, 1964 at p. 12.
30. (1949) 93 Sol. j. 220.

ed for murder and who was subsequently convicted and hanged. It was said that he was a human vampire and supporting descriptions were furnished. It was also said that he had committed other murders and the names of the victims were supplied. The newspaper company was heavily fined and the editor sent to prison. Lord Chief Justice Goddard said that "in the long history of the present class of case there has never, in the opinion of the court, been one of such gravity as this, nor one of such a scandalous and wicked character. It was of the utmost importance that the court should vindicate the common principles of justice and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct".

The Indian cases and texts affirm similar principles, and Article 19(2) of the Constitution is quite explicit in affirming that nothing in Article 19(1)(a) setting forth a guarantee of freedom of speech shall affect the operation of any existing law or prevent the State from making any law relating to contempt of court. Mr. Justice Mukherjea said in the broadest terms in *Brahma Prakash Sharma* v *Uttar Pradesh*[31] that any publication "calculated to interfere with the due course of justice or proper administration of law by such court ... can be punished summarily as contempt", and Justice Douglas in his Tagore Lectures pointed specifically to the strictness of the Indian law of contempt as compared with the American law.[32]

Until 1960, English law did not permit appeal against a conviction for contempt[33] and the jurisdiction in contempt was summary. This rests upon a curious history,[34] but it has also been justified on the principle that the recourse to indictment or criminal information would be "too dilatory and

31. (1953) S.C.R. 1169. See also *Public Law Problems in India* (Stanford 1957) at pp. 103-107.
32. *Studies in American and Indian Constitutional Law* (1956) at p. 258.
33. Administration of Justice Act, 1960. See 13.
34. See Cowen *op cit* ante note (2) at p. 65 et seq.

too inconvenient to afford any satisfactory remedy".[35] It is only as recently as 1960 that there has been a statutory excuse that publication took place in reasonable ignorance that legal proceedings were pending or imminent[36] and that a distributor was an innocent disseminator.[37] The practical result is that liability for contempt generally requires some degree of negligence on the part of the publisher. Even though the penalties are criminal, it is a reasonable principle that there should not be a requirement of intent or actual foresight; as the Phillimore Committee observed, most publishing is a commercial enterprise undertaken for profit. and the power of the printed or broadcast word is such that the administration of justice would not be adequately protected without a rule which requires great care to be taken to ensure that offending material is not published.[38]

One of the more curious aspects of the law was the problem exposed by the publication of what had taken place in preliminary criminal proceedings. Alongside the rule that publication of matter calculated to prejudice the conduct of a fair trial was punishable as contempt was the rule in English and some Commonwealth jurisdictions that publication of the details of such preliminary proceedings was not subject to restriction. Such proceedings are, in effect, preliminary enquiries by magistrates into more serious charges of crime to determine whether the accused should be discharged forthwith or whether he should be sent for trial by an appropriate court. The *Law of Libel Amendment Act 1888* has been construed as giving authority for publication of such proceedings. The consequence, as pointed out by a distinguished Scots lawyer, is that as regards publication of such material before trial, the English rules are as lax as rules regarding comment are strict. Often in such cases, only prosecution evidence is tendered and the result is that wide-

35. *R.* v *Davies,* (1906) I KB 32 at 41.
36. *Administration of Justice Act* Sec. 11(1).
37. See 11(2).
38. Cmd. 5794 at p. 34.

spread publicity is given to material, including confessions, which may ultimately be excluded at the trial. The trial of Dr. John Bodkin Adams for murder was a spectacular example. In the preliminary proceedings, prosecution evidence was given that other patients of Adams had died in mysterious circumstances and this evidence was not and could not be given at his trial. In the event Adams was acquitted but the blaze of publicity given to the prosecution evidence made the burdens of defence counsel and the very able trial judge, Devlin J. very difficult, though they discharged them very well. At the trial, Devlin J. urged magistrates to use their power to hear such cases *in camera*.

The *Adams* case is a conspicuous one, but only one among many, and these cases give substantial justification to an American comment: "one wonders about the calibre of some of the existing English tabloids."[39] It is very easy to look at the excesses of American media dealing with substantial crime and say, as did Lord Reid in the *Thalidomide* case, that "there has long been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented ... . If we were to ask the ordinary man or even a lawyer in his leisure moments why he has that feeling, I suspect that the first reply would be—well, look what happens in some other countries where that is permitted."[40] It is certainly the case that there is a difference between American and English-Commonwealth law and practice, but the *Adams* case and other comparable cases make it clear that Lord Reid's comfortable description of difference from "other countries" does not very perfectly fit the facts. One looks back a decade or so to the unhappy and spectacular Profumo-Keeler story and to the trial of Stephen Ward, and to the times when these squalid stories dominated large sections of the Press. More to the specific point, it is well to recall Ludovic Kennedy's comments on

39. Goldfarb: *The Contempt Power* at p. 89.
40. (1973) 3 All ER 54 at pp. 64-65.

the Ward case. Ward was convicted and committed suicide. Kennedy in his account of the trial writes :

> "... there were other reasons too, many overlapping and all accumulative which led the jury to their verdict. The first was something that happened long before they had been either called or chosen. This was the very wide publicity given to the proceedings at the lower court at the end of June and beginning of July. It is impossible to overestimate the harm that this publicity must have done to Ward's defences. The prosecution's case was *prima facie* more damaging to him than it was at the Old Bailey ; for it contained not only Ronna Ricardo's lying evidence, which must have seemed to those who read it (and who didn't ?) as general confirmation of what Mandy and Christine had alleged, but also two charges concerning the arranging of abortions and one of keeping a brothel. The last charge was subsequently dropped for lack of evidence and the two abortion charges were placed on a separate indictment. The evidence for all three charges was flimsy in the extreme, and it is impossible to resist the conclusion that the only reason they were brought was the belief that the more mud that was thrown, the more chance that some of it would stick. The dice was loaded in the prosecution's favour even further by the fact, unknown to the general public, that the defence at the lower court deliberately said little for fear of disclosing its hand. All this combined to make the ordinary reader (including the subsequent Old Bailey Jury) believe that Ward was guilty of a multitude of sexual misdemeanours long before he was tried. It was all very well Mr. Justice Marshall telling the jury to put out of their minds everything they had heard so far : but this was virtually an impossibility."[41]

All of this rakes over the ashes of scandalous detail now long forgotten, but at the time avidly read. The point of such extended quotation is to exhibit the absurdity and

41. The Trial of Stephen Ward (1964) at pp. 233-234.

inconsistency of laws which on the one hand prohibit publication of material by reference to a law of contempt designed to protect a fair trial against prejudicial legal proceedings and on the other allow publication in the form of reports of committal proceedings. There are areas of the Commonwealth in which such publication and inconsistency does not occur either because of differing criminal law procedures or because of controls over publication,[42] and in the aftermath of the *Adams* case, a committee under Lord Tucker reviewed the reporting of public committal proceedings and made recommendations which would have severely restricted publication. It is noteworthy that these recommendations and the legislation which ultimately gave effect to them met with trenchant opposition from the Press and from the Press Council.[43]

No doubt it is a good instinct of a free press to fight against the imposition of new controls, and it may be that a better approach lies in devising different pre-trial procedures. If it be, as Lord Reid said in the *Thalidomide* case, that what the law seeks to do is to strike a balance between a public interest in the freedom of speech and a public interest in the protection of the administration of justice, then the results that the law reached in such cases as these are extraordinary and incoherent.

I was in the United States when the assassination of President Kennedy occurred. I watched on television the events which unfolded in the immediate aftermath of the assassination: the arrest of Oswald and the public recitation of his record and history, which was highly prejudicial, and the subsequent events in the Dallas Police and Courts Building culminating in the shooting of Oswald. I had not then paid much attention to the law of contempt and in particular

42. See Cowen, *ante* note (18) at p. 16.
43. See Cmd. 479 at p. 16. See also Gower: *The Aftermath of the Admas Case* (1957) 20 Modern L.R. 387 and Jones: *Justice and Journalism* (1974) at pp. 105 et seq. See also *Criminal Justice Act 1967*.

to the United States law, but my immediate, shocked reaction to the activity of the media was to believe that they had committed horrendous contempts. It was in consequence of this that I undertook some serious study of contempt in British and American law and learned something of the diversities of approach. Some little time later, in December 1963, the American Bar Association issued a statement in which it said that what had taken place

> "struck at the heart of a fundamental rule of law with its guarantees of a fair trial for everyone, however heinous the crime involved. The widespread publicizing of Oswald's alleged guilt, involving statements by officials, and public disclosures of the details of 'evidence' would have made it extremely difficult to empanel an unprejudiced jury and afford the accused a fair trial. It conceivably could have prevented any lawful trial of Oswald due to the difficulty of finding jurors who had not been prejudiced by these public statements."

The Warren Commission, as I noted in my first lecture, recorded that "the experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial'"[44] and it called on "the representatives of the bar, law enforcement association and the news media (to) work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigation, court proceedings, or the right of individuals to a fair trial."[45] It was, in many respects, a rehashing of the public debate over what had happened in the thirties in the *Hauptmann* case. Then, thirty years earlier, it had been written that "there never was a case in which publicity agencies and commentators and public argufiers were more unrestrained, never a case exhibiting perhaps the most

44. See *ante*.
45. at p. 47.

spectacular and depressing example of improper publicity and professional conduct ever presented to the people of the United States in a criminal trial."[46] Nonetheless, the general approach of many American commentators is to call for *voluntary* restraints only. To one taught in the English doctrine this seems very strange; even though we may not go all the way with H. L. Mencken in saying that "journalistic codes of ethics are all moonshine", we say that it is for the law to shape rules to deal with these problems, and English and Commonwealth law deals with them by resort to the law of criminal contempt. Moreover, as we shall see later, considerable difficulty has been experienced in America in formulating a constitutionally viable law of contempt to deal with such problems.

I have already referred to a symposium early in 1965, in which I took part in the United States, in which the issue of Fair Trial-Free Press was discussed particularly in light of the events of the Kennedy assassination and the Warren Report. Those who participated were American lawyers, journalists, media men and a great city police chief. What emerged was a consensus that the Warren Commission was right in saying that it was a matter of importance to take steps to improve the situation, that there was a general belief that there had been gross excess of publicity and a stirring up of massive prejudice in the aftermath of the assassination, but in the discussion there was a reiterated unwillingness to accept compulsion through the law to control such publicity. The Press and media men were resistant to any such moves and there was no readiness to accept the English contempt formulation. It was said that whatever the English situation, the price of such restriction in the United States was too high. It was a proper role for the Press to conduct independent enquiries of its own into all aspects of the life of the society, including the administration of justice. In the specific context of the Kennedy assassination and the conduct

46. Hallam *Publicity in Criminal Trials* (1940) 24 Minnesota L.R. 453 at p. 454.

of the media at that time, while there was a very real awareness of exceses, it was said by one distinguished American journalist that it was neither possible nor appropriate to impose controls on publicity at such a time. Alfred Friendly, then managing editor of the *Washington Post*, put it that anyone who called for controls at such a time was preaching a "never-never land" doctrine. When I said that British controls would operate in such a case in the British context, the statement was received with courteous scepticism and it was said that even if it were so, the pressures operating within the American society would not allow it.

I shall come to a more detailed consideration of the American law later. What I wish to consider next is the most recent development in the English law in this area, in the *Thalidomide* case; a case unique in character, in which a respected English newspaper and editor resolved to take action, during the currency of protracted litigation, in order to bring pressure to bear on the defendants to those actions. Distillers Ltd. who had manufactured and placed thalidomide on the English market with such disastrous consequences for many deformed children and their families. It was a striking case for many reasons : it emerged, as the editor wrote, from the greatest drug tragedy of our time, and thalidomide was seen as a symbol of the havoc that a technically complex society can wreak upon its own members. In support of its right to publish and its unabashed claim to bring pressure to bear on the powerful defendant company to come to a reasonable settlement, the *Sunday Times* propounded doctrines which took me back to that Santa Barbara debate in January 1965 when Alfred Friendly argued that there were cases and circumstances of such a character that a body of law could not withstand the pressures of public concern. In such circumstances how is the balance to be struck between the public interest in free expression and discussion and the public interest in the due administration of justice ? The latter interest in this case is the assurance of a fair trial free of the possible prejudice which may result from con-

current public discussion of the matters in issue in the litigation and from publication and statements intended to put pressures on parties to vary their course of action in that litigation.

7

PREJUDICIAL PUBLICITY AND THE PROTECTION OF THE FAIR TRIAL—2

Attorney-General v *Times Newspaper Ltd.*[1] the *Thalidomide Case* is a case of major interest and importance. It was, as I have said, the first case in the law of contempt directly affecting the Press ever to go to the House of Lords.[2] The issues out of which it arose were of great public interest and concern. The *Sunday Times*, the defendants in the action, in which the Attorney-General sought an injunction to restrain publication of an article on thalidomide which dealt with the actions and conduct of Distillers Ltd., the company which manufactured and sold the drug, acted with high responsibility. It was a classic case of investigative journalism ; it gave expression to a deep concern on the part of the paper with the fate of the thalidomide children and the seeming deficiencies of the law. At the conclusion of the litigation the *Sunday Times* expressed its dismay at the result, though there is no doubt that its actions were largely responsible for the surge of public concern which led Distillers Ltd. ultimately to offer new and very different terms for settlement. The publication of the *Thalidomide Children and the Law*[3] which contains an introduction by the editor of the *Sunday Times*, Mr. Harold Evans, the texts of the judgments in the three jurisdictions through which the case passed, and a reprint of editorial comment on the decision, and a significantly different comment of view by Lord Devlin, himself a former judge of great distinction and the first lay

1. [1972] 3 All E.R. 1136 ; [1973] 1 All E.R. 815 ; [1973] 3 All E.R. 54.
2. *Report of the Committee on Contempt of Court* Cmd. 5794 of 1974 at p. 1.
3. Andre Deutsch (1973).

Chairman of the English Press Council, is further testimony to the continuing and genuine concern of the newspaper with the issues. The thrust of the *Sunday Times* argument was that the courts had been given the opportunity for a classic debate on the limits and role of a free Press, and had been found wanting. The *Phillimore Committee on Contempt of Court* had been appointed in 1971; as I have also said, it delayed its report to allow it to consider and to assess the *Thalidomide* decision, which it discussed and criticized in detail.

The facts can be stated in brief compass. Thalidomide was the greatest drug tragedy of our time, and eight thousand children were born deformed because their mothers took thalidomide.[4] The drug was withdrawn in 1961 and the first writs against Distillers alleging negligence were issued in 1962. There were formidable difficulties facing by the plaintiffs, going to proof of negligence and to the very existence of a cause of action on behalf of children who had suffered such gross injury while still *en ventre sa mere*. In 1967 Distillers made an offer of settlement on the footing of a determination of the basis of damages to be made by a judge. That judicial determination was made; it would have provided very inadequate support and recompense for the thalidomide victims, and the *Sunday Times* resolved to take action to help the children. The first article, published on 24 September 1972, had harsh things to say of a company of great resource which, in the *Sunday Times*' view, showed a gross lack of concern for the thalidomide victims. A second article, which, as an outcome of the decision in the case, was never published and was not seen by the Phillimore Committee, but which clearly traversed issues which were material to the conduct of Distillers in the preparation of the drug—the Phillimore Committee said that it was clear from the judgments in the case that it contained a detailed analysis of some of the evidence likely to be given in the case and a

4 *The Thalidomide Children and the Law* at p. 7.

discussion of the issue whether or not the Distillers Company were negligent in putting the drug thalidomide on the market[5]—was sent to the Attorney-General who had raised questions following the publication of the article on September 24. The Attorney-General sought an injunction to restrain publication of the second article; he succeeded in the Divisional Court; its decision was reversed in the Court of Appeal and restored by the House of Lords. While the specific issue of contempt was the second article, the first, September 24 article, was also discussed in the case and diverse views were expressed on the question whether, under the existing law, it constituted a contempt.

Distillers made a new offer in 1973 of a settlement seven times larger than its original offer some six years earlier. As Mr. Robin Day, a member of the Phillimore Committee, observed in a separate note in the report, if the campaign against Distillers was a serious interference with the course of justice, the law of contempt was unable to prevent it. A campaign was waged in the Press, on television and in Parliament, and the House of Commons relaxed its own *sub judice* convention to discuss the case with the consequence that newspaper and broadcast reports of Parliament included comment which might otherwise have led to contempt proceedings. There were pressures for a better offer from institutional shareholders, and a boycott of Distillers' products was threatened. "Despite the suppression of the *Sunday Times* article", says Mr. Day, "the campaign of protest and pressure made a mockery of the law of contempt".[6] The Phillimore Committee regarded the case as "perhaps unfortunate"[7]: the magnitude of the tragedy, the uncertain legal liability of the defendants, as well as the delay in bringing the proceedings to a decision were all exceptional circumstances and were of themselves calculated to excite public interest, concern and debate. In view of all that happened, it appears that the

5. Report *ante* note (2) at p. 41.
6. Report *ante* note (2) at p. 100.
7. At p. 47.

unpublished article by itself had, and would have had, no great impact on the litigation. This was expressly recognised by Lord Reid in the House of Lords :

> "If we regard (the unpublished article) solely from the point of view of its likely effect on Distillers I do not think that its publication in 1972 would have added much to the pressure on them created, or at least begun, by the earlier article of 24th September. From Distillers' point of view the damage had already been done. I doubt whether the subsequent course of events would have been very different in their effect on Distillers if the matter had been published"[8] and it was impliedly accepted by all the Law Lords that the article would not have been likely to affect the court or the witnesses.

Counsel for the *Sunday Times* took the highest ground in arguing for a clear statement of the balance of interest as between freedom to publish and the protection of the due administration of justice, and argued that the public interest in this case supported publication. Alone among the three courts, the Divisional Court unanimously rejected the propriety of considering and striking a balance. Lord Widgery C.J. said that the court was not called upon to balance competing interests, but that the law required that a comment which raised a serious risk of interference with legal proceedings should be withheld until the proceedings were determined. He proceeded, somewhat surprisingly, to say that the balancing of competing public interests was an administrative rather than a judicial function and if left to the courts would give rise to uncertainty and to inconsistency of decision, so that even if the court were not constrained by authority "we should not have regarded the increased power and importance of the news media as a ground for relaxing the law of contempt but, if anything, an argument to the contrary".[9] It is an odd statement : the common law has been concerned with balancing in so many areas. The Divisional Court, however,

8. (1973) 3 All E.R. 54 at p. 64.
9. [1972] 3 All E.R. 1136 at p. 145.

saw the matter very clearly: the avowed purpose of the article was to persuade Distillers to pay more, to bring pressure to bear on the defendants and their advisers through the stirring of public opinion and concern :

> "In the end this appears to us as a very simple case in which a newspaper is deliberately seeking to influence the settlement of pending proceedings by bringing pressure to bear on one party. Not only is the interference intended, but, having regard to the power of public opinion, we would have no hesitation in saying that the publication of the article complained of would create a serious risk of interference with Distillers' freedom of action in the litigation. It would therefore be a clear contempt".[10]

In the terms in which it formulated its judgment, the Divisional Court saw the previously published article of September 24 as a clear contempt, in that it put pressure on Distillers to act otherwise than it had so far done in respect of the issues in the litigation. In the Court of Appeal, Lord Denning, while affirming the principle that the course of justice must not be deflected or interfered with, that those who struck at it strike at the very foundations of our society[11], and that trial by media must not be tolerated, held in company with the other members of that court that there was no contempt in this case. In the first place there was an interest of the public in matters of national concern and in the freedom of the Press to make fair comment on such matters. Interests must be balanced and there may be cases where the subject matter was such that the public interest prevailed over the interests of the parties, and in such a case, and this was one, the public interest in open discussion prevailed. The Court of Appeal laid stress on the fact that the litigation was dormant and had been dormant for years, and also on the fact that since the Divisional Court's decision

10. [1972] 3 All E.R. 1136 at p. 1146.
11. [1973] 1 All E.R. 815 at pp. 821-2.

there had been such discussion of the matter in Parliament and in the Press that it was "quite unreal"[12] to continue the injunction. The House of Lords reversed the decision of the Court of Appeal. The ground of dormancy of the litigation which loomed so large in the Court of Appeal's decision was flatly rejected by the House of Lords, and the point was made in this context that the very nature of the proceedings made the parties on either side reluctant to bring the matter into open court, and this involved protracted and delicate negotiations for settlement. While the House of Lords reached the same decision as the Divisional Court the majority in the House of Lords stated a quite different principle. It was held that in private and even public persuasion of a litigant was not foreclosed by the law of contempt, but that the vice in the unpublished article lay in its prejudgment of the actual issues in the suit, even if on the facts of the particular case, prejudice could not be said to be likely to arise. Lord Reid said :

> "What I think is regarded as most objectionable is that a newspaper or television programme should seek to persuade the public, by discussing the issues and evidence in a case before the court, whether civil or criminal, that one side is right and the other wrong... I do not think that the freedom of the Press would suffer, and I think the law would be clearer and easier to apply in practice if it made a general rule that it is not permissible to prejudge issues in pending cases."[13]

and Lord Cross said that

> "We should maintain the rule that any 'prejudging' of issues, whether of fact or law, in pending proceedings—whether civil or criminal—is in principle an interference with the administration of justice...An absolute rule—though it may seem to be unreasonable, if one looks only to the particular case—is necessary in order to

12. (1973) 1 All E.R. 815 at p. 826.
13. [1973] 3 All E.R. 45 at pp. 64, 65.

prevent a general slide towards trial by newspaper or television".[14]

Where the Lords differed from one another was over the issues raised by the published article of September 24. Lords Reid, Morris and Cross would not have held that the pressures brought to bear on Distillers in that article constituted contempt, while Lord Diplock would have drawn a distinction between private pressures which might be permissible and public pressures or obloquy which were not. Lord Simon of Glaisdale saw pressures generally as within the ambit of contempt, subject to a possible qualification in the case of some private pressures.

As the *Sunday Times* editorially reviewing the litigation observed, the judgments in the courts revealed a welter of differing views : the Divisional Court and two Law Lords would have stopped the published article of September 24, and the Court of Appeal and three Law Lords would have allowed it. On the more general issue, the law remained uncertain, the public interest was prejudiced, and there was an urgent need for reform of the law, clear of the emotive fear of trial by newspaper[15]. Lord Devlin[16] in an article in the *Sunday Times* expressed the view that the case had loosened up the law : the House of Lords had held that the protection of contempt was available only so long as the litigation was actively pursued, and one difference between the House of Lords and Court of Appeal lay in their reading of the facts as to whether the litigation was being actively pursued. Moreover the definition by the majority in the House of Lords of what was involved in prejudgment of issues had narrowed the ambit of contempt. It was now the law that bringing of pressure to bear on a party did not, in the absence of unlawful means, constitute a contempt. Further it had been held that the discussion of public affairs was not suspended merely because as an incidental, but not intended

14. at p. 84.
15. *The Thalidomide Children and the Law* at pp. 149 et seq.
16. *Sunday Times* July 29, 1973.

by-product, it might prejudice a litigant or party in a particular case.[17]

The Phillimore Committee gave extended consideration to the *Thalidomide* case. In general it concluded that while "the right to issue such publications must on occasion be overridden by the public interest in the administration of justice...we consider that the balance has moved too far against the freedom of the Press".[18] As already noted, the point was made that the case itself, because of its tragic implications, and because of the difficulties which were seen to stand in the way of the litigation, was an unfortunate one. While accepting the validity of the objection to trial by media which, especially in jury trials, could severely impair confidence in the impartial administration of justice, it did not suffice to adopt the Lords' test of prejudgment. In the context of the *Thalidomide* case, the unpublished article itself was not, as Lord Reid acknowledged, likely to have any significant effect on the outcome of the case or on the parties, even though it specifically traversed and prejudged issues in the case. Lord Cross raised further points about prejudgment: what of discussions of legal issues in learned journals; what of the extensive discussion and expression of opinion in scientific journals on the manner in which thalidomide operated to produce deformities? The House of Lords had not propounded a test which was both sufficiently certain and sufficiently respnsive to the mischief which the law of contetmpt was intended to remedy. The Phillimore Committee concluded that:

> "The simple test of prejudgment therefore seems to go too far in some respects and not far enough in others. We conclude that no satisfactory definition can be found which does not have direct reference to the mischief

17. *Ex parte Bread Manufacturers* (1937) 37 S.R. (N.S.W.) 242 at p. 249 *per* Jordan C.J., *Ex p Dawson* (1961) S.R. (N.S.W.) at p. 575.
See Report of Committee on Contempt of Court at p. 44.
18. at p. 44.

which the law of contempt is and always has been designed to suppress. That mischief is the risk of prejudice to the due administration of justice.'[19]

The solution proposed was a statutory definition of contempt: the test of contempt should be whether the publication complained of created a risk that the course of justice would be seriously "impeded or prejudiced".[20] Even then there should be a discretion which might be exercised in relation to particular matters.

It is doubtful whether any words can do better and provide a more certain and precise test in an area into which judgment and discretion must necessarily enter. The point made by the Phillimore Committee that the administration and application of the law of contempt has moved too far against the freedom of the Press is helpful, and it may reasonably be deduced from their analysis that the committee would have decided the *Thalidomide* case otherwise. What remains quite clear however is that there is no disposition to abandon the law of contempt in favour of permitting unrestrained comment and activity by the media. This compares, as we shall see, with American decisions which have leaned heavily in favour of allowing Press and media comment, while reversing convictions on due process grounds because of the contamination of such media activity. The Phillimore Committee argues for the maintenance of legal controls to protect the trial process, while it looks critically at the reach and character of those controls. It may reveal a prejudice in favour of an accustomed approach, but I would express my own view that whether or not the Phillimore Committee achieves the most satisfactory formulation of the legal test—and that task is by its very nature a very difficult one, particularly in our time—its approach to the problem is sound. It is well to recall the committee's general observation that "there has been a wider tendency in recent years to challenge authority of all kinds, including that of the courts. Challenge to

19. at p. 48.
20. at p. 49. See the Indian Contempt of Courts Act, 1971, Sec. 13.

authority has, of course, long been a robust tradition in our social and constitutional development, but so also has the deeply-rooted British belief in combining liberty with order under the rule of law fairly and independently administered by the courts of justice. These considerations point to the need to preserve the principles of the law of contempt, although substantial reforms are necessary to take account of modern conditions."[21]

The media have complained of the present laws of defamation and contempt that they operate against the public interest and impose unjustifiable restraints upon their liberty to investigate and to report fully and appropriately, particularly in those areas in which investigation is called for in the public interest. In the area of contempt, interlocking problems arise in respect of "gagging writs" and in respect of the time within which the law of contempt may operate. A person may seek to stifle further publication of Press investigation by issuing a writ, most commonly for libel (though it may be another civil remedy), against the defendant publisher. Such gagging writs, it has been said, impose constraints upon further or repeated publication because the issues have become *sub judice* and are consequently protected by the law of contempt. It is observed that such writs are not infrequently issued for this very purpose and that there is no intention of pursuing the action further. In a recent case, Salmon L.J. described as a "widely held fallacy"[22] the notion that the issue of a writ automatically stifles further comment and in the *Thalidomide* case[23] in the House of Lords, Lord Reid said that there was "no magic" in the issue of such a writ, which ought to have no effect. The Phillimore Committee agreed but observed that the matter remained uncertain since there was no means of knowing whether the writ was simply a gagging one or a prelude to

21. Report *ante* note (2) at pp. 5-6.
22. *Thomson* v *Times Newspapers Ltd.*, (1969) 3 All E.R. 648 at p. 651.
23. [1973] 3 All E.R. 54 at p. 65.

action.[24] The committee observed further that the problems could be better resolved, in the context of the civil writ, by reformulating the prejudgment definition of contempt as proposed and by a sharper definition of the points of time at which contempt proceedings might be brought.

This matter of time has been one of considerable concern. In the area of criminal proceedings, there is little challenge to the view that the contempt power should operate from the time a person is charged or a summons served. Such controversy as there has been has relatetd to an earlier period of time when proceedings are "imminent" and there is some authority which would hold that a publication at such a time constitutes a contempt.[25] The decision of the Australian High Court in *James* v *Robinson*[26] holds to the contrary, and the reasoning of that case is that it is not possible to attach the penalties of contempt to acts done prior to the initiation of the proceedings which it is the function of the law of contempt to protect. The Phillimore Committee adopted this view in criminal proceedings[27], and the more difficult and significant problems arise in connection with civil proceedings. It was said that the problem of when a publication is at risk was one of the greatest single sources of anxiety for the Press. In the *Thalidomide* case there were no proceedings *in court*, and the decision of the Court of Appeal rested in part on the finding that the proceedings were dormant. While this was rejected in the House of Lords, Lord Reid, in restoring the injunction, observed that it might be dissolved if it appeared that the action or the settlement of the action was not being actively pursued. The Phillimore Committee was unanimous in the view that to apply the strict rules of contempt in civil

24. at p. 38. See *Report of the Committee on Defamation* Cmd. 5909 of 1975, Chap. 19 esp. at p. 155.
25. *Reg* v *Beaverbrook* (1962) N.I.15 See Cowen: Some Observations on The Law of Criminal Comment in *Sir John Latham and Other Papers* (1965) at pp. 85 et seq. See also *R.* v *Savundranayagan and Walter,* [1968] 3 All E.R. 439.
26. (1963) 109 C.L.R. 593.
27. at p. 32.

cases from the issue of the writ or summons was not only to stifle legitimate freedom of speech and comment for an unreasonable length of time, but was also unnecessary for the proper protection of the parties and the due administration of justice. While recognising that the time might still be long, the majority in the committee supported the view that the law of contempt should apply from setting down for trial.[28] Mr. Robin Day in a separate note observed, and the whole committee acknowledged, that there might be a long period between setting down and the actual trial of the action. He preferred a shorter time and advocated the creation of a 'sub judice' list to be published very shortly (within a week or two) before the case was ready to proceed to trial.[29] There is merit in this, and what is certainly clear is that in civil proceedings there should be a limited period during which the proceedings are protected by contempt. There is also an end point and the general recommendation of the Phillimore Committee was that this should be fixed by the conclusion of the trial or hearing at first instance both in criminal and civil proceedings. This expressly involves a judgment that there is no need to protect regular appellate proceedings in this way.[30] Such proposals, which have a very real and practical bearing on the broad issues of freedom of expression and comment would contribute to a satisfactory solution of the problem of the "gagging writ".

While the *Thalidomide* case still exposes difficulties in the English law with reference to the permitted area of comment, and while it has been subjected to criticism, as by the Phillimore Committee, there is no disposition at all to abandon the field. As Mr. Robin Day said in his note in that report: "In particular I fully agree with the need for strict and clear application of the law of contempt in criminal cases. I have no wish to see imported into this country what the Salmon Committee called 'the horror of trial by Press, tele-

28. at p. 55.
29. at pp. 98-100.
30. at p. 55.

vision and radio'. Nor do I know of any responsible journalist who advocates anything of this kind."[31] The modern American cases stand out in contrast, though there is no holding squarely on jury trials. Responsible American journalists, while they may condemn the excesses of a *Hauptmann* trial and the post-Kennedy assassination events, and while they may give support to codes of practice of voluntary application, resist vigorously and emphatically any suggestion that English contempt rules should apply.[32]

As in the case of defamation it was not always so. In *Patterson* v *Colorado*,[33] the Supreme Court of the United States held that the power to punish for contempt was not denied by the First Amendment, and in the three following decades American courts in various jurisdictions used the contempt power to punish, *inter alia*, Press publications by reference to the test of their tendency to obstruct justice. In 1941, *Bridges* v *California* and *Times-Mirror* v *Superior Court of California in Los Angeles*,[34] contempt convictions by California State courts were reversed by majority decisions in the Supreme Court of the United States as unconstitutional abridgements of freedom of speech and the Press. In *Bridges*, Harry Bridges had sent a telegram to the Secretary of Labour which was published in Californian newspapers. It attacked a decision of a State Judge as outrageous and said that an attempt to enforce it would precipitate strike action. In the *Times-Mirror* case, labour unionists awaiting sentence were described in a newspaper editorial as gorillas who should be sent to prison as an example to the community. Californian courts had held these publications to be contempts, since they were prejudicial to the fair conduct of trials before judges sitting without juries. The Supreme Court reversed this decision by reference to a requirement of a showing of

31. at p. 100.
32. *Fair Trial v a Free Press* (Occasional paper published by the Center for the Study of Democratic Institutions 1965), *passim*.
33. (1907) 205 U.S. 454.
34. (1941) 314 U.S. 252.

'clear and present danger' a constitutional formula drawn from other constitutional contexts. It was said that the substantive evil must be extremely serious and the degree of imminence of danger extremely high before utterances or publication could be punished as contempt. It was said that, having regard to American constitutional history and law, English authorities were not decisive and that the pressures brought to bear on the judges were of little significance. Frankfurter J., speaking for the dissenting judges, stressed the importance of safeguarding fair and balanced trials. He did not find special significance in the 'clear and present danger' test which he saw as an "expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional significance".[35]

In *Pennekamp* v *Florida*[36], the Supreme Court unanimously reversed a State court conviction for contempt in respect of articles attacking judicial integrity and performance. On the facts it was not a strong case, and the court held that there was no impact on the conduct of pending proceedings. Frankfurter J. in a separate concurrence reminded the court of the importance of striking a proper balance between the interests of a free press and the conduct of a fair trial. In *Craig* v *Harney*,[37] the Supreme Court, once again divided, reversed a State court conviction for contempt. Successive newspaper articles criticized a layman judge for his conduct of judicial proceedings which were described, at a time when a motion for a new trial was pending, as arbitrary and as a travesty of justice. Despite a finding that the articles were intemperate, the court restated the requirement of an imminent and not merely a likely threat to the administration of justice. Vinson C.J. and Frankfurter J. dissenting pointed out that these newspapers dominated the community in which they were published, that they constituted a formidable

35. at p. 296.
36. (1946) 328 U.S. 331.
37. (1947) 331 U.S. 367.

pressure on this individual judge, and they found no basis for interfering with the finding of the trial judge that they constituted a clear and present danger to the due administration of justice. In a separate dissent, Jackson J. pointed to the fact that the judge was a layman with no anchor in professional opinion and that his short elective term made him peculiarly sensitive to such pressures.

In *Maryland* v *Baltimore Radio Show Inc.*,[38] the Supreme Court declined to review a decision of the Maryland Supreme Court reversing a contempt conviction by a trial court. The contempts charged were radio broadcasts about a negro charged with the murder of a young girl. The crime was atrocious and had attracted wide attention. One of the broadcasts announced as a 'sensation' reported the arrest of the accused and gave a detailed account of his confession and prior criminal record. This material was also broadcast by other radio stations. The accused in these circumstances waived jury trial and was tried and convicted of murder by a three-judge court. A Maryland court held that the radio broadcasts constituted a contempt, but this was reversed by a majority in the Maryland Supreme Court by reference to the clear and present danger test. In this case, there would have been a jury trial had the accused not elected otherwise, but the Maryland court described the distinction between jury and non-jury trials as "hardly tenable...in every community there are citizens who by training and character are capable of the same firmness and impartiality as the judiciary".[39] The Supreme Court of the United States declined to review without giving reasons, and Frankfurter J. took the somewhat unusual course of filing a separate opinion in which he pointed out that the denial of review did not disclose any view of the court beyond a refusal to take the particular case. In an appendix to his opinion he collected the English decisions on contempt by publication to the prejudice of the due administration of justice.

38. (1950) 338 U.S. 912.
39. *Baltimore Radio Show Inc.* v *State* 67 A 2d 497 at pp. 508-9.

In *Woods* v *Georgia*,[40] another majority decision, the Supreme Court reversed a contempt conviction by a Georgia court. The State court had convicted a sheriff who had called a press conference and made statements which were held by the court to constitute a clear and present danger to the deliberations of a grand jury sitting and considering the matters on which the sheriff had spoken. Warren C.J. found no clear and present danger; he distinguished the case as a general grand jury investigation into a matter of concern to the general community and said that the court should not at this time consider the "variant factors that would be present in a case involving a petit jury".[41] Harlan J. dissented; in his view the State conviction met federal constitutional standards. The sheriff was a law enforcement officer and this gave an official and authoritative character to his statements while the grand jury was engaged on a special investigation which had been the object of the sheriff's statement and attack. "What may not seriously endanger the independent deliberations of a judge may well jeopardize those of a grand or petit jury."[42]

These cases—*Bridges, Pennekamp and Craig* v *Harney*—were discussed by Justice Douglas in his Tagore lectures in 1955. He observed that the decisions were "distinctly American" and that they might not fit the conditions of other lands where the judiciary is more aloof, but that they did not mean that the Press can dominate a trial or lash the judge without limit. He drew attention to the policies of the First Amendment and to the necessity for maintaining fair judicial administration. Where Press comment crossed the forbidden line was a matter on which judges commonly disagree. The test in America was a severe one and the weight of the Court was on the side of public comment and against the use by judges of the summary contempt power.[43] In a recent United

40. (1962) 370 U.S. 375.
41. at p. 389.
42. at pp. 401-2.
43. *Studies in American and Indian Constitutional Law* at p. 257.

States case[44], it was said that the preferred position of the First Amendment had never been approved in a case where a balance must be struck between free speech and fair trial, but this is surprising in light of so much that has been said in the highest American courts. In *Sheppard* v *Maxwell*[45], while the extensive publication of prejudicial matter was deplored by members of the court, there was no disposition in the Supreme Court to restrain such publication by contempt proceedings, but there was an expression of concern that action, short of such compulsion, should be taken to control excesses. There have, however, been cases which, in special contexts, have supported legal controls. In *Cox* v *Louisiana*,[46] the Supreme Court upheld a Louisiana statute prohibiting picketing in or near a court house with intent to impede the administration of justice or to influence a jury or witness. Goldberg J. said that the legislature might properly recognise the effect on judges, jurors and others involved in such activities. In *Illinois* v *Allen*,[47] Mr. Justice Black said that courts could use the most stringent powers to see that a judge could maintain proper control in his court, and in the case of gross and disruptive behaviour on the part of an accused person, could bind and gag him in court, could remove him from the courtroom until he gave an undertaking to behave properly, or could cite him for contempt. Justices Black and Douglas have been the members of the Supreme Court who in recent years have insisted on the 'absolute' and peremptory application of the First Amendment, conspicuously in cases of defamation and obscenity. Such cases as *Illinois* v *Allen* are to be seen, presumably, as examples of speech with an impact on action, a phrase used by Douglas[48] to indicate what will not attract the protection of the First Amendment. The notion

44. *U.S.* v *Tijerina* (1969) 412 F2d 661 (10th circuit).
45. (1966) 384 U.S. 333.
46. (1965) 379 U.S. 559.
47. (1970) 397 U.S. 337.
48. *Roth* v *United States*, (1957) 354 U.S. 476 at p. 511.

is a very slippery one and one which seems to me to be of doubtful validity.

There is a further problem in the American case law. How far does the doctrine of *New York Times* v *Sullivan*[49] extend its reach ? I have already discussed that case in the specific context of defamation and the constraints imposed by the First Amendment on defamation proceedings. Its application was extended in a doubtful way to the area of privacy in *Time Inc.* v *Hill*[50] and in *Garrison* v *Louisiana*[51] to a case in which a conviction for criminal defamation was reversed where a District Attorney had commented critically on the motives and abilities of judges. That case was not framed in contempt, but the logic of the argument ought not to rest on the proceedings being framed in a particular way. The doctrine of the *Sullivan* case has not been squarely invoked in the contempt context, where it has been acknowledged that there may be balancing considerations of free speech and fair trial. Within the defamation context one may also believe that there are also balancing considerations as between free speech and the protection of reputation and yet in *Sullivan* the court, except with the narrowest qualifications, declined to recognise the appropriateness of striking such a balance. It has been well said that the application of the *Sullivan* doctrine to cases involving prejudice to fair trial would be extreme; the Constitution itself expressly recognises the right to fair trial. On the decided cases, and even without the application of the *Sullivan* doctrine to this area of the law, we have a situation which exhibits the "paradox...that a constitutional rule designed to protect the citizen's ultimate political responsibility has rebounded to deprive the citizen of an impartial trial".[52] It is the case that the power to

49. (1964) 376 U.S. 254.
50. (1967) 385 U.S. 374.
51. (1964) 379 U.S. 64.
52. Barist: *The First Amendment and Regulation of Prejudicial Publicity: An analysis* (1968) 36 Fordham L.R. 425 at pp. 447-448.

control prejudicial publicity by resort to contempt proceedings in the case of ordinary jury trials was left open expressly in *Woods* v *Georgia*[53] where Warren C.J. referred to the variant factors that would be present in the case of a petit jury. What is to be spelled out of this reservation is very uncertain, and in one of the earlier cases the Court said that jurors are "men of fortitude, able to thrive in a hardy climate".[54] The English courts see the matter in a very different light; as Lord Ellenborough said more than a hundred and fifty years ago: "if anything is more important than another in the administration of justice it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide with minds pure and unprejudiced. Is it possible that they should do so after having read for weeks and months before *ex parte* statements of the evidence against the accused which the latter had no opportunity to disprove or to controvert ?"[55] This has been reaffirmed many times; it assumes, beyond doubt, the prejudicial tendency and effect of such publication and publicity.

Certainly it is the case that the American cases thus far decided show that the contempt power is a negligible device for protecting a defendant's right to a fair trial.[56] There has been a persistent expression of dissent in the American Supreme Court by Justice Frankfurter and by Justice Harlan. In *Irvin* v *Dowd*[57] Frankfurter wrote that:

> "Not a term passes without this Court being importuned to review convictions had in States throughout the country in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutors' collaboration—exerting pressure upon potential

53. (1962) 370 U.S. 375.
54. *Craig* v *Harney* (1947) 331 U.S. 367 at p. 376.
55. (1811) 11 R.R. 799.
56. Donnelly and Goldfarb: *Contempt by Publication in the United States* (1961) 24 M.L.R. at p. 245.
57. (1961) 366 U.S. 717 at pp. 729-730.

> jurors before trial and even during the course of trial, thereby making it difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced to forgo trial by jury... For one reason or another, this Court does not undertake to review all such envenomed state prosecutions. But again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome... This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedon of the Press, property conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors are poisoned, the poisoner is constitutionally protected in plying his trade."

This was a case of a successful application to the Supreme Court of the United States for reversal of a conviction for murder on the ground that undue and prejudicial publicity surrounding the events and trial had foreclosed the possibility of a fair trial and had thereby denied the accused a trial satisfying the requirements of due process of law. There had been a barrage of newspaper publicity before the trial directed against the accused; radio and television recited his personal history, his record of juvenile crimes and other convictions; he was described as a 'confessed slayer', a parole violator and a fraudulent cheque artist. There are other cases in which the Supreme Court has taken such action.[58] As Frankfurter said in *Irvin* v *Dowd*, the result is very un-

58. See e.g. *Shepherd* v *Florida* (1951) 341 U.S. 50; *Rideau* v *Louisiana* (1963) 373 U.S. 723. See Cowen *op cit* ante note (25) at pp. 82-3.

satisfactory, and reversals of convictions do not operate as controls on the activities of the media. Such reversals are "all in the nature of afterthoughts or after-effects"[59] and may well produce the result that a guilty man goes free because the court denies to itself power at an earlier point to control publicity which tends to prejudice the conduct of proceedings, the outcome of which they will subsequently nullify because and only because of that prejudicial publicity. As Judge Will has put it: "it can be either the public or the accused who suffers as the result of the publicity, to say nothing of the ill-effects on the fair and efficient administration of justice."[60]

It is an extraordinary outcome in the attempt to balance the competing claims of fair trial and free Press, and prompts reflection on some of the foolish and socially unacceptable outcomes of the law. Until recently it appeared that the English law concentrated only on the punishment of the contempt; having done that, the prejudicial publication was not seen as ground for reversal of a conviction. An American writer noted this in observing that the greatest failure of English contempt law was its "disrelation with its most valuable object—the protection of fair trial. It is of little service to an accused person who is written into jail by a prejudiced Press that the publisher or editor is fined or imprisoned. His victory is a hollow one unless the conviction is reversed. The contempt vehicle is only indirectly curative of unfair trials, if at all, though this is its most valuable purpose."[61] In very recent times however there have been statements in English cases which assert a power to deal with convictions in such cases. In *R* v *Malik*[62] a man was convicted and sentenced for an offence against the *Race Relations Act*, the offence being incitement by public speech. Shortly before his trial, the

59. Will: *Fair Press* v *Fair Trial* (1963) 12 De Paul L.R. 197 at p. 209.
60. *ibid* at p. 205.
61. Goldfarb: *The Contempt Power* at p. 88.
62. (1968) 1 All E.R. 582.

Sunday Times had published an article with a picture of the accused together with a caption which led to the conviction and substantial punishment of the paper for contempt.[63] It was argued that this made a fair trial impossible; the *Sunday Times* was widely read and was respected as a serious paper so that the publication might have a serious prejudicial effect on the jury. Lord Parker C.J., acknowledging this, said that "the Court has considered this matter with some anxiety because if it is felt that there was any danger that this man had not had a fair trial, they would without hesitation set aside this conviction".[64] In the circumstances it did not do so: the accused did not deny the statement and the intent was clear. The Court did not, however, give any consideration to the possibility that the publicity might have itself affected his course of action at the trial. In *R* v *Savundranayagan and Walker*[65], the accused were convicted and given heavy sentences after a long trial for conspiracy to cheat and defraud. When Savundra's arrest was imminent he was subject to a searching television interview which was subsequently reprinted in a Sunday paper. The Court of Appeal characterized the television interview as deplorable; it also assumed that penalties for contempt could attach at a point when proceedings were imminent but not yet initiated by charge or arrest. It was argued that this prejudicial publicity was ground for reversal of the conviction. The Court of Appeal acknowledged that in appropriate circumstances this might be done but held that in this case it was not appropriate: Savundra had appeared voluntarily on television at a time when he strongly suspected that he was to be arrested, the trial did not take place until eleven months later and the judge at the opening of the trial and in summing up had warned the jury to disregard anything they had read or seen out of court. The evidence of guilt was overwhelming and there was no real risk arising from prejudicial publicity.

63. *R.* v *Thomson Newspaper Ltd.* (1968) 1 All E.R. 268.
64. *R.* v *Malik*, (1968) 1 All E.R. 582 at p. 584.
65. (1968) 3 All E.R. 439.

How an American reviewing court would have approached this case cannot be certainly predicted, but there has certainly been a readier disposition in America to find a want of due process. The English courts have now opened this door in these cases, but one may hazard the guess that it is likely to be a narrow opening.

In this discussion I have dwelt principally on the English and the American law. The law in my own country, Australia, is in substantial accord with the English law, though there may be differences on particular issues, as, for example, on the point of time at which contempt penalties may attach. The Indian law accords substantially with the English; Article 19(2) in reserving contempt of court from the ambit of the freedom of speech and expression granted by Article 19(1)(a) leaves the law of contempt in that situation.[66] This is an area in which, in modern times, the English and American law have reached differing conclusions in striking a balance between freedom of speech and the media and the claim to fair trial. The English law stresses the importance of the fair trial; the American cases the freedom of expression, and over the last thirty years, whenever the rights of the Press have conflicted with the rights of fair trial, the courts have favoured freedom of the Press. Commentators in recent years, particularly since the events of the early sixties, have suggested that there may be a move to restore balance between these claims of right by adopting standards which will protect both the right to a fair trial and freedom of the Press. While the media certainly act as if no control exists or is likely to be devised and no doubt draw comfort from long practice, from the absolutist position of some judges, and from the formidable body of decided cases, a reading of those cases does not compel the conclusion that the Constitution forecloses any use of contempt powers to control prejudicial publication by the media.

66. See Report of the Committee on Contempt of Courts (1963); Contempt of Courts Act, 1971.

The English view on the other hand, particularly as reflected in the recommendations of the Phillimore Committee, is that there is a case for narrowing the controls over free press expression, and the committee's criticisms of the *Thalidomide* case point in this direction. It is interesting to reflect that in the United States the pressures of tragic events have led to debate on the desirability of moving the balance in the direction of more control of Press and media expression, while similar pressures have in England invited a new look at the severity of the constraints on publication.

8

THE REACH OF THE LAW OF OBSCENITY

IN HIS TAGORE LECTURES, Mr. Justice Douglas observed that book banning is as old as books; almost two thousand years ago the Emperor Caligula, who is remembered for some odd appointments to office, banned the Odyssey. In this my final lecture, I am concerned with book banning and with restraints on freedom of expression and publication in the context of laws relating to obscenity. These issues have occasioned continuing and active debate; in my country, Australia, such laws and their administration have been a persistent source of controversy since the earliest days of the Commonwealth. The Australian censor began a very active career by banning the entry of Balzac's *Droll Stories*. Many works were well known in many parts of the world largely because they were banned books. The ban on James Joyce's *Ulysses*, which was the subject of one of the major early United States cases on censorship (in which a federal court of appeals lifted the ban on the book),[1] was said to have created a black market in the book run by men whose normal vocabulary was almost confined to the four-letter words that had earned it such a bad name. D.H. Lawrence's novel, *Lady Chatterley's Lover*, was described by the *London Economist* on the eve of the trial of Penguin Books Ltd., in 1960, for publication of an unexpurgated edition, as having "enjoyed worldwide suppression".

Over a period of a few years from the end of the 1950's, *Lady Chatterley's Lover* stood trial in the courts of the United States, the United Kingdom and India. In the United States, a federal district court reversed a decision of the Postmaster-General denying the book access to the mails and this judg-

1. *United States* v *One Book Entitled Ulysses* (1934 72 F2d 705.

ment was sustained on appeal.[2] The court held by reference to the principles formulated by the Supreme Court of the United States in *Roth* v *United States*[3] that the book was not obscene and was accordingly entitled to mail facilities. In *Reg.* v *Penguin Books Ltd.*,[4] the trial of the publisher under the provisions of the Obscene Publications Act, 1959, in England resulted in an acquittal by the jury. The trial took place over six days; it attracted widespread attention and extensive comment and, as the Act of 1959 specifically allowed, it brought forth as expert witnesses "more distinguished writers, moralists, theologians and Eng. Lits. than any jury (in England) had ever seen in one week". Having regard to the complex provisions of the Act, the verdict did not disclose specifically what the jury found : whether the book was not obscene, or that it was obscene but that its publication was justified for the public good as being in the interests of science, literature, art or learning or for other objects of common concern.

The publication of this edition of *Lady Chatterley's Lover* followed very quickly after the enactment of the Obscene Publications Act, 1959. That Act became law at the end of a decade of battle over obscenity laws. It was a struggle to liberate books and other writings from what Mr. Justice Stable, earlier in the decade, had called "the standards thought proper for a fourteen-year-old schoolgirl".[5] For almost a century, the law of obscenity had been dominated by the definition given by Lord Chief Justice Cockburn in *Reg.* v *Hicklin*,[6] in which that judge had interpreted obscenity as it appeared in Lord Campbell's Obscene Publications Act 1857, which, however, furnished no statutory definition. In high Victorian language, Cockburn L.C.J. said:

2. *Grove Press Inc. and Readers Subscription Inc.* v *Christenberry*, (1960) 276 F2d 433.
3. (1957) 354 U.S. 476.
4. The Trial of Lady Chatterley, *Reg.* v *Penguin Books Ltd.* Ed. C.H. Rolph. (Penguin Books 1961).
5. *R.* v *Secker and Warburg Ltd.* (1954) 2 All E.R. 683.

> "I think the test of obscenity is this: whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".

The language of 'deprave and corrupt' has been carried into more modern statutory definitions of obscenity[7] and it has been repeated many times by many courts. It gives rise to difficulties since the evil sought to be averted is not made clear. It may be one of four things : a tendency to induce people to commit crimes, particularly sexual crimes, a tendency to induce people to behave in a manner reprehended by some code of morality, particularly sexual morality, whether in a criminal way or not, a tendency to shake belief in some accepted code of morality, or a tendency to stimulate or arouse erotic thoughts or desires which is referred to in modern United States cases by the words "prurient interest".[8] Moreover, the *Hicklin* test allows a publication to be punished as obscene where the alleged obscenity lies in part or parts of a work, but does not characterise or permeate the work as a whole. As Walter Gellhorn has said, the test allows four letters to count for more than four hundred pages.[9] The Obscene Publications Act, 1959 (later amended in 1964), was a compromise, not wholly satisfactory, which redefined the criminal offence of obscenity. It was declared to be an offence to publish an obscene article, and an article was deemed to be obscene if its effect, taken as a whole, tended to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to read the matter contained in it. A defence was constituted by section 4 which provided that a person should not be convicted of an offence if it was proved

6. (1868) 3 Q.B. 360 at p. 371.
7. See Bray: *The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency* (1972) 46 Australian L.J. 100 at p. 102.
8. *ibid.* at p. 103.
9. *Individual Freedom and Governmental Restraints* (1956) at p. 54.

that the publication in question was justified for the public good on the ground that "it is in the interest of science, literature, art or learning, or of other objects of general concern". The Act contains other useful provisions giving booksellers a defence of innocent dissemination, limiting penalties on conviction, and giving publishers and authors an opportunity to defend their books against destruction orders.

The Act of 1959 effected important modifications of the *Hicklin* test. It demanded consideration of the work as a whole and not simply of parts and fragments. Thus, in the English trial of Penguin Books Ltd., the jury was required to read the whole book, and the judge instructed the jury to consider the book as a whole, though the prosecution was not restrained from continuing the bad custom of referring to and commenting on particular passages.[10] The effect was measured by the impact on persons likely in all the circumstances to read the matter, not necessarily by the most susceptible of persons in the shape of Mr. Justice Stable's fourteen-year-old schoolgirl. Finally, and of very real importance, a person could not be convicted of publication of an obscene article if there were countervailing considerations of public interest. Experts might be called on this issue, though they might not speak to the issue of obscenity itself. The notion of "obscene but excused" is a curious one, and is one of the obvious compromises of the Act. In the United States, the matter has not been approached in this way : proof of literary or other merit, which may be supported by the evidence of armies of scholars and other experts, goes directly to the issue of obscenity.[11] For many years the United States courts have

10. *The Trial of Lady Chatterley* op cit. ante note 4 at p. 4.
11. As to this, a North American commentator notes, "Our laws proscribe obscenity as such and by name, and we are unwilling to admit that great literary and dramatic works can be, and frequently are, obscene..... The various statutes making up the law have made obscenity a criminal thing, and our judges assume that if a work of art is really a work of art and not vulgar rubbish, it cannot be obscene. Thus, Judge Woolsey, in his celebrated opinion in the *Ulysses* case, recounts how he had

declined to follow the *Hicklin* test: the Supreme Court of the United States in one of the most recent of the many obscenity cases, which have come before it, referred to the "now discredited test in *Hicklin*".[12] In the United States trial of *Lady Chatterley*, Judge Bryan found that the Postmaster-General had gone wrong in that he had weighed isolated passages which he considered obscene against the remainder of the book and concluded from this that the work as a whole must be condemned; he had disregarded the dominant theme and effect of the book and in his reference to the community, he had failed to appreciate that the tests of obscenity are not whether the book or passages from it are in bad taste or shock or offend the sensibilities of an individual or even of a substantial segment of the community.

In the Obscene Publications Act, 1959, and in current statutes in Australia and elsewhere, the words "deprave and corrupt" persist. They are odd words in the context of our times, and they are susceptible of diverse interpretations. They expose, in a peculiar way, the uncertainties in the whole thrust of the law which imposes restraints on freedom of expression and publication in the interests of protecting individuals and the community against the contamination of obscenity. It has been said, in English cases, that to convict of obscenity requires a showing that what is published tends to 'deprave and corrupt' and not merely to 'shock and disgust'.

asked two literary friends whether the book was obscene within the legal definition, which he had explained to them, and how they had both agreed with him that it was not. But of course *Ulysses* is obscene. Not as obscene as an undoubted masterpiece, Aristophanes *Assembly of Women* which would not be a masterpiece—which would not be anything were its obscenity removed, but obscene nevertheless. The trouble springs from the fact that the Tariff Act of 1930 would exclude 'obscene' books from the country, and Judge Woolsey, being a sensible man, did not want this to happen to *Ulysses*. So he fashioned a rule to protect it." Berns: *Pornography v Democracy: A Case for Censorship*, The Public Interest, (Winter 1971) 3 at p. 8-9.

12. *Miller v California*, (1973) 93 S.C. 2607 at p. 2620. The test was rejected in the first of the modern major cases in the Supreme Court, *Roth v United States*, 354 U.S. 476.

This point was made by Stable J. in *R.* v *Secker and Warburg Ltd.*,[13] by Mr. Gerald Gardiner, as counsel for the defence and by Byrne J. in his summing-up in *Reg.* v *Penguin Books Ltd.*,[14] and by the trial judge in *R.* v *Calder and Boyers Ltd.*[15] It is open to question, however, whether despite the fact that the words of *Hicklin* are often repeated in the courts in which its authority and the language of 'deprave and corrupt' persist, the courts really are seriously concerned with the words and, indeed, whether they are really concerned to make these distinctions.

An English committee reporting on the English obscenity laws in 1968 concluded that the distinction was unreal. It said that although judges emphasise that an article cannot be condemned simply because it shocks or disgusts, that is precisely what happens, since juries have no other criterion to guide them.[16] In a thoughtful judgment in the High Court of Australia in *Crowe* v *Graham*,[17] Windeyer J. said of the *Hicklin* test :

> "Despite the obvious unsuitability of this sentence as a legal definition of obscenity it, taken from its context, has had a great vogue. It has fostered much misunderstanding. But it has been too often repeated to be now discarded. And it is at the base of statutory definitions of obscenity, both in England and Australia. Yet it has survived really, because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is pro-

13. (1954) 2 All. E.R. 683.
14. ante note 4.
15. (1968) 3 W.L.R. 964. "It just won't do to pick out the purple passages. It is deprave and corrupt, not shock and disgust".
16. *The Obscenity Laws* : A Report by the Working Party set up by a Conference convened by the Chairman of the Arts Council of Great Britain (1969) at p. 35.
17. (1968) 121 Commonwealth L.R. 375 at pp. 592-3.

perly called obscene. If so its evil tendency and intent is taken to be apparent."

From this it is argued that the *Hicklin* test may not now mean what it was thought to mean in the past. What is now struck at is the shock to decorum, and the tendency to deprave and corrupt has dwindled into a legal fiction arising conclusively from affronts to community standards of decency and not from anything else.[18] It is certainly the case that while the distinctions between deprave and corrupt and other words are verbally preserved in the English courts, there are very real difficulties in directing a jury in terms of the Obscene Publications Act, as was apparent from the recent case of *Reg.* v *Calder & Boyers*,[19] the trial of *Last Exit from Brooklyn*. There the judge, in directing the jury, distinguished deprave and corrupt from shock and disgust; he offered dictionary definitions of deprave and corrupt; he instructed the jury to consider the work as a whole. All of this took place after a trial lasting nine days with thirty experts testifying for the defence of the book. The judge's direction to the jury was held by the Court of Appeal to be unsatisfactory; "in effect", said the appeal court, "he threw them in at the deep end of section 4 and left them to sink or swim in its dark waters". The Court of Appeal, having both criticized the trial judge's discretion and acknowledged the difficulty of his task, formulated an acceptable direction, but it is not easy to see how it advances the matter much further, and this is troubling when the issue directly touches the cherished liberties of free expression and publication.[20] It is not surprising

18. Bray : ante note 7 at pp. 103 105. See also *McKinlay* v *Wiley*, (1971) West Australian L.R. 3 and Dickey : *The Legal Concept of Obscenity in Western Australia* (1972) 10 W.A.L.R. 223.
19. (1968) 3 W.L.R. 974.
20. The direction reads : "The jury must consider on the one hand the number of readers they believe would be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt and the nature of the depravity or corruption ; on the other hand they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and

that late in the 1960's a working party was set up by a conference convened by the Chairman of the Arts Council of Great Britain to investigate the working of the Obscene Publications Act 1959-1964, and other relevant Acts. The report of the working party drew attention to the difficult position of the judge required to direct in terms of the Acts. His position was likened to that of "a coachman invited to drive to an address that we are unable to specify."[21] I shall consider this report in more detail later. With some savings, the working party recommended the repeal of the United Kingdom obscenity laws, and in particular, the Obscene Publications Act 1959-1964, for a trial period of five years.

In India, the courts have applied the *Hicklin* test for many years without searching inquiry, and with considerable severity.[22] In *Udeshi* v *State of Maharashtra*,[23] which was the Indian chapter in the saga of *Lady Chatterley's Lover* in the courts, Hidayatullah J. in the Supreme Court of India upheld a conviction for the sale of the book under the terms of section 292 of the Indian Penal Code. That section prohibited various dealings with obscene matter; like Lord Campbell's Obscene Publications Act, it did not define the concept. This and associated sections of the Code were originally enacted to give effect to the Convention for the Suppression of the Circulation of and Traffic in Obscene Publications signed at Geneva in 1923. It was said that the Geneva Conference having failed to define obscenity proceeded to agree to its suppression.

In India, the case raised constitutional questions. Article 19 of the Constitution assures freedom of speech and expression but qualifies it by acknowledging the lawfulness of

decide whether on balance the publication is proved to be justified as being for the public good" at p. 968.

21. *The Obscenity Laws* (Deutsch 1969) at p. 27.
22. See *The Roots of Obscenity* : *Obscenity, Literature and the Law* (ed) A.B. Shah 1968) passim, and esp. Sharma : *Obscenity and the Law* at pp. 49 et seq., Rao: *Obscenity, Literature and the Law* at pp. 74 et seq.
23. A.I.R. 1965 S.C. 881.

restrictions in the interests of decency and morality. It was argued, *in limine*, that section 292 was unconstitutional but this was given short shrift by Hidayatullah J. who held quite explicitly that what the section prohibited fell directly within the terms of the 'decency and morality' exception in Article 19.[24] It was then argued that the *Hicklin* definition of obscenity was outmoded and should not be applied. Hidayatullah J. rejected this argument : he held that the test had been uniformly applied in India and should continue to apply. He rejected the argument that *scienter* must be established : the test was the *tendency* to deprave and corrupt, not the knowledge or intent of the defendant. He acknowledged in a thoughtful, careful and humane consideration of the problem that times and values had changed and might change very considerably and significantly, but he upheld the conviction on the *Hicklin* principle. The judge expressly recognized the clash of the "claims of society to suppress obscenity and the claims of society to allow free speech". His conclusion may best be stated from passages in the judgment :

> (Counsel) is not right in saying that the *Hicklin* case emphasized the importance of a few words or a stray passage. The words of the Chief Justice were that 'the matter charged' must have 'a tendency to deprave and corrupt'. The observation does not suggest that even a stray word or an insignificant passage would suffice. An observation to that effect in the ruling must be read *secundum subjectum materiam*, that is to say, applicable to the pamphlet there considered..... We need not attempt to bowderlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way..... In our opinion, the test to adopt in our country (regard being had to our community *mores*) is that obscenity

24. See *ante*.

> without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency, but the extent of such appeal in a particular book, etc., are matters for consideration in each individual case.....
>
> (Lawrence) went too far. While trying to edit the book so that it could be published in England, he could not excise the prurient parts..... He wanted to shock genteel society, a society which had cast out and banned him..... This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings.....When everything is said in its favour we find that in treating with sex, the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above.[25]

The judgment of the court traversed a substantial *corpus* of authority, American as well as English. Ultimately, Hidayatullah J. rested his decision upon the authority of *Hicklin*, though he acknowledged the continuing shift in standards and values. He did not, however, enquire deeply into the uncertainties of meaning in the words 'deprave and corrupt', and he strongly emphasised the relevance of contemporary community standards. In its subsequent dicision in *Kakodkar* v *State of Maharashtra*,[26] the Supreme Court of India, not surprisingly to the eye of this outside observer, reversed a conviction under section 292 of the Code in respect

25. See *ante*.
26. A.I.R. 1970 S.C. 1390.

of a much less significant piece of writing. The court once again affirmed that the *Hicklin* test was applicable and quoted Hidayatullah J.'s observation in *Udeshi* that a balance must be struck between freedom of speech and expression and decency and morality, but that when the latter was substantially transgressed, the former must give way.

Indian commentators have been critical of the decision in the *Lady Chatterley* case and of the continuing affirmation of the *Hicklin* test. In a recent symposium, concerned Indian writers and scholars have explored the issues in a critical and sensitive way and with an awareness of developments which have taken place in society in India and elsewhere. The judgment of one writer, shared by a number of others, is that "the legacy of English law has not been a very happy one... The Indian courts, in spite of their several attempts to adjust the concept of obscenity to the needs of a different society and a different time, have not been able to free it completely from the concepts of a more intolerant age... The law of obscenity in India needs a thorough reform".[27] It has been said that the substantive law on obscene publications in India was practically the same a century later as it was in England in 1868,[28] and the editor of a leading constitutional text has said that the Supreme Court has erred in not rejecting the *Hicklin* test which has become obsolete, that the case lays down a vague and arbitrary standard for judging obscenity and has a tendency to curtail the guaranteed right to freedom of speech.[29]

In *Kakodkar* v *State of Maharashtra*,[30] the Supreme Court made some thoughtful observations on the issues involved in obscenity cases.

The concept of obscenity would differ from country to

27. Rao : *Obscenity, Literature and the Law in The Roots of Obscenity* at p. 75.
28. Sharma : *Obscenity in the Law in The Roots of Obscenity* at p. 54.
29. Singh in Shukla : *The Constitution of India* (6th ed. 1975) at p. 69.
30. A.I.R. 1970 S.C. 1390.

country depending on the standards of morals in contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any reference to sex in what is written whether if that is the dominant theme or not they would be affected would be to require authors to write books only for the adolescent and not for the adults.

In early English writings, authors wrote only with unmarried girls in view but society has changed since then to allow literature and artists to give expression to their ideas, emotions and objectives with full freedom except that it should not fall within the difinition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a context of sex, love and ramance. In the field of art and cinema also, the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are now taken for granted without in any way tending to debase or debauch the mind..... What we have to see is that whether a class, not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must therefore be judged from this aspect."[31]

31. at p. 1395.

This recognizes many of the problems which lie deep in the law of obscenity. The reference to the divergent paths of England and France recalls the case of Emile Zola. At the end of the 1880's Vizetelly, the English publisher of Zola's *La Terre*, was convicted for publishing the work at a time when the French Government recognized it by the award of the Legion of Honour. The paths of the two nations converged a few years later, when Zola was honoured by literary London. The changes which have taken place over time in attitudes to authors, artists and their words and creations have been recorded in general and legal writings and in the courts. In a recent case in the Supreme Court of the United States, Burger C.J. noted that "the sexual revolution of recent years may have had useful by-products in striking layers of prudery from a subject long irrationally kept from need ventilation", though he followed this immediately with the admonition that "it does not follow that no regulation of patently offensive 'hard core' material is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine".[32] In *Udeshi's* case, Hidayatullah J. gave some account of the changes in attitude to particular books and writings over time. The reference in *Kakodkar* to 'early English authors' refers presumably to Victorian writers, and this recalls Dr. Bowdler who added a word to the language when he offered us bowdlerized classics in which, he claimed, nothing was added to the original text, but those words and expressions were omitted which could not with propriety be read aloud to a family. One recalls the words, so extraordinary in their time and place in 1960, when counsel for the prosecution in *Reg.* v *Penguin Books Ltd.*[33] asked the jury in *Lady Chatterley* "Is it a book that you would even wish your wife or your servants to read?"

32. *Miller* v *California*, (1973) 93 S. Ct. 2607 at p. 3621.
33. ante note 4 at pp. 15-16. C.H. Rolph, the editor, observes : "This last question had a visible—and risible—effect on the jury and may well have been the first nail in the prosecution's coffin".

Whatever one says of change, it is well to note, as was said in *Kakodkar*, that there may well be differences of attitude and outcome in different countries : the differences in outcome in the various judicial appearances of *Lady Chatterley* reveal a more cautious and conservative Indian approach, and it is unlikely from the statement of facts in the *Kakodkar* case that prosecution would have been launched at that time in many other common law countries.

At the same time, and this is relevant to what was said by the court in the passage quoted from *Kakodkar*, within short passages of time, far short of the quarter century referred to in that case, profound changes of attitude have occurred. In 1959, a judge in Australia held that an article in a magazine called 'The Unmarried Mother by Choice' was obscene because it tended to deprave and corrupt by suggesting that it was meritorious for a woman to bear an illegitimate child.[34] The present Chief Justice of South Australia, commenting on this decision, rightly says that it is an illustration of how far we have travelled over the last decade that similar articles now appear, without a murmur, in the daily Press.[35] In February 1969, an English judge sentenced a man to two years' imprisonment for possessing for gain two volumes of *My Secret Life* by Walter and on two similar charges concerning two other works[36] at a time when the book was freely available from book stores in the United States. In 1975, the book could be freely bought in paperback at an airport shop in Adelaide, South Australia. Such severe penalties and, in particular, such marked changes of attitude over so short a period of time give great cause for concern. It is also the case that a decision to prosecute a particular work may arouse great social and political passions. A conspicuous example of this was the trial of *Oz* 28 in London in 1971. That trial, under the Obscene Publications Act, went

34. *Mackay* v *Gordon and Gotch (Australia) Ltd.*, (1959) V.R. 420
35. Bray, ante note 7 at p. 104.
36. Cited in *The Obscenity Laws*, ante note 21 at p. 74.

on for 26 sitting days at the Old Bailey; it attracted a panoply of 'experts', for the most part of very different style and character from those who gave evidence a decade earlier in the English trial of *Lady Chatterley*. The trial ended in convictions and severe prison sentences were imposed which were subsequently varied on appeal. *Oz* 28 was certainly banal, tasteless and humourless,[37] to take the words of Professor Ronald Dworkin who gave evidence for the defence and who subsequently wrote in angry protest against the decision, which was seen by many as an attack by authority on the counter-culture at a time when passions ran high. It was also seen as a misuse of the obscenity laws, which were not invoked against meretricious and patent pornography, which was freely available not far from the courtroom in the Soho shops. The friends of *Oz* protested angrily and tumultuously against the decision[38] and even those who had no sympathy for *Oz* and for what it represented were sharply critical of the conduct of the judge, of the prosecution and of the severity of the penalties imposed.[39]

Forty years ago, in *United States* v *One Book Entitled Ulysses*,[40] a United States federal court made a historic and distinguished contribution to the law in freeing James Joyce's *Ulysses* from the reach of the law of obscenity. Judge Woolsey's celebrated judgment affirmed, in the context of literary obscenity, that the author's intention was relevant, that the dominant effect of the work and not isolated passages must be considered, that in considering the effect of a book, the 'reasonable' man, a creature well known elsewhere in the law, must be taken as the yardstick and that

37. *The Listener* 3 September 1971.
38. See Palmer : *The Trial of Oz* (1971) ; Cowen : *From the Trial of Lady Chatterley to the Trial of Oz*, Supplement to the Australian School Librarian, December 1971 at pp. viii-xi.
39. See Botsford : *The Innocence of Oz, Encounter* 37 No. 5 (November 1971) 64.
40. (1934) 72 F2d 705.

literary or artistic merit must be weighed against incidental obscenity.

Despite its liberating effect, this decision inevitably left areas of uncertainty, and in 1957 the Supreme Court of the United States considered the issue of obscenity in *Roth* v *United States*.[41] A majority in the court affirmed that obscenity was not protected by the First Amendment; that the speech which the Constitutoin assured of freedom was that which had some redeeming social value, and obscenity had none. This judgment gives expression to the need to weigh and to balance: the public interest in the suppression of obscenity outweighs the interest in freedom to express that which is obscene. Mr. Justice Douglas does not appear to have reached a definite position on this matter when he delivered the Tagore Lectures in 1955, but by the time of *Roth*, shortly afterwards, he had established his position, in company with Justice Black, that the First Amendment denied to the law any reach into this area. His view has been plainly expressed on many occasions since then : he would remove obscene expression from the calendar of crimes and from the possibility of suppression by censorship. This, in his view, is plainly required by the express terms of the First Amendment and it is a general principle appropriate to the conditions of a free society. He observes that people have varying tastes, interests, practices and outlooks. "Why", he asked in dissent in *Ginzburg* v *United States*,[42] "is freedom of the Press and expression denied..... When the Court today speaks of 'social value' does it mean a 'value of the majority'?..... If a publication caters to the idiosyncrasies of a minority why does it not have social importance ?" More recently in *Miller* v *California*,[43] he said:

> "Obscenity cases generate tremendous emotional outbursts. They have no business being in the courts...

41. (1957) 354 U.S. 476.
42. (1966) 383 U.S. 463 at pp. 489-490.
43. (1973) 93 S. Ct. 2607 at pp. 2624, 2625, 2627.

> Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to gaol for violating standards they cannot understand, construe and apply is a monstrous thing to do in a nation dedicated to fair trials and due process... the path towards a mature, integrated society require(s) that all ideas competing for acceptance must have no censor."

That has been a consistently expressed view, though in its absoluteness it commands no other support in the court since the departure of Justice Black, though some judges have lately moved close to it, not so much because of the same reading of the terms of the First Amendment, as because of the impracticability of formulating manageable standards for judging what may and what may not be suppressed by law.[44] Over the greater part of two decades, the Supreme Court has struggled with what Justice Harlan called "the intractable obscenity problem";[45] a problem which, as the same judge said in an earlier case, arises because the court in such cases finds itself in an area where knowledge is small, data is insufficient and experts divided.[46] In the comparatively short period since *Roth* v *United States* in 1957, the Supreme Court has been concerned in more than 30 cases with obscenity issues. From 1957 until *Miller* v *California* in 1973, there was no single majority view as to proper standards for testing obscenity and this, as Burger C.J. said in *Miller* v *California*, "has placed a strain on both state and federal courts."[47] In the Supreme Court the issue has been debated within a constitutional context, and a decade ago it was described as a constitutional disaster area.[48] In *Roth* v

44. *Paris Adult Theatre I* v *Slaton*, (1973) 413 U.S. 49 at p. 84 ; *Miller* v *California*, (1973) 93 S. Ct. 2607 at pp. 2627-8.
45. *Interstate Circuit Inc.* v *Dallas*, (1968) 390 U.S. 676 at p. 684.
46. *Roth* v *United States* (1957) 354 U.S. 476.
47. (1973) 93 S. Ct. 2607 at p. 2617.
48. Magrath : *The Obscenity Cases* : Grapes of Roth (1966) Sup. Ct. Rev. 7 at p. 59. "The court has turned the law of obscenity into a constitutional disaster area".

United States the majority required a coalescence of three elements to establish obscenity : the dominant theme of the material taken as a whole must appeal to a prurient interest in sex, the material must be patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters, and the material must be utterly without redeeming social value. It is not surprising that such tests have proved difficult of application, and that the subsequent obscenity cases have exposed sharp differences and shifts of opinion. A judge, who in one case knew hard core pornography when he saw it, has subsequently given up and largely abandoned the field because of the difficulty of setting meaningful standards.[49] The court has been uncomfortable and uncertain in the application of the *Roth* tests; in *Ginzburg* v *United States*,[50] the court, atypically, in a case which raised sharp controversy[51] inside and outside the court, upheld the conviction because Ginzburg had been guilty of "pandering" in the advertising of his obscene wares. The "leer of the sensualist" made its brief appearance in this case, but shortly thereafter the court returned to its practice of reversing obscenity convictions, although the publications involved were at least as offensive as anything published by Ginzburg.[52]

49. Stewart J. in *Jacobellis* v *Ohio* (1964) 378 U.S. 184 at p. 197 and later in dissent in *Miller* v *California* (1973) 93 S. Ct. 2607 at pp. 2627-8.
50. (1966) 383 U.S. 463.
51. Thus Stewart J. in dissent : "Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society could be strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance—(1966) 383 U.S. 463.
52. Berns : *Pornography* v *Democracy* : *A Case for Censorship*, The Public Interest, Winter 1971 3 at p. 9.

In *Miller* v *California* in 1973,[53] a bare majority reached agreement in sustaining a conviction and in a statement of principle. The defendant was prosecuted under a State law directed at the distribution of obscene matter. He had conducted a mass mailing campaign of explicitly sexual material to persons who had indicated no consent to receive it, and while the case might have been decided on a narrower basis, it was considered in the Supreme Court on general principles relating to obscenity. The majority view, stated by Burger C.J., was that the Constitution protected works which, taken as a whole, had serious literary, artistic, political or scientific value regardless of whether the Government or a majority of the people approved of the ideas those works represented.[54] Works and articles which did not meet these standards did not have protection : these were works which, taken as a whole, appealed to the prurient interest in sex, portrayed sexual conduct in a patently offensive way and were lacking in serious literary, artistic, political or scientific value. The majority judgment provided some illustrations and examples of what might lawfully be forbidden. The court stressed the importance of contemporary community standards as a measure for determining the issue of obscenity. In defining those standards it was not possible, in a country as big and diverse as the United States, to set a single national standard. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.....the primary concern with requiring a jury to apply the standard of 'the average person applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person rather than a particularly susceptible or sensitive one. We hold the requirements that the jury evaluate the materials

53. (1973) 93 S. Ct. 2607.
54. at p. 2620.

with reference to 'contemporary standards of the State of California' serves this protective purpose and is constitutionally adequate."[56] There were two strands in the dissent in *Miller* v *California*. Douglas J. stated his position, while three judges who had earlier been more confident of the possibility of framing workable tests of obscenity now concluded that a reading of the cases showed that tests like 'prurient interest', 'serious literary value' were lacking in objectivity so that ultimately the decision must vary with the experience, outlook and even idiosyncrasies of the person defining them. This left the law prospectively too uncertain; certainty came only with the decision in the particular case and inevitably had an *ex post facto* character. The same argument has been advanced against obscenity prosecutions under such legislation as the English Obscene Publication Act. Thus, Professor Ronald Dworkin in his criticism of the *Oz* case wrote;

> "The Oz jury could decide what standards to fix for the Oz defendants, but not what standards another jury will apply in another place... It means that the jury's decision in each such case will necessarily be *ex post facto*, so that a publisher must ask himself not what the law forbids, but what some ten random people might prefer their community not to have available. This is censorship by repressive uncertainty : it is the worst kind and the most unfair."[57]

Of course common law courts often deal with general notions: the concepts of the reasonable man and reasonable care are deep in the common law, and all judgments which call for specific applications of broadly framed tests, standards and concepts necessarily have an *ex post facto* aspect in the sense that the decision cannot be known until it is given. How unjust such a result may be cannot be answered *a priori*; in the case of obscenity, where there is so much uncertainty and

56. at pp. 2619, 2620.
57. *The Listener*, 2 September 1971.

where the evidence points to changing standards and values and to a rapid shift in community values, and where the issues are of great importance to freedom of expression, the argument against the grant of such broad and uncertain discretions is very strong. The Working Party on the British obscenity laws said emphatically that it was intolerable that a man should be punished for an action the criminality of which he had no means of ascertaining in advance, and that where juries and defendants were left without a comprehensible definition of the crime alleged, the defendant was at the mercy of public opinion. This was a system of censorship rather than a system of law.[58]

In *Miller* v *California*, the Supreme Court of the United States emphasised the importance of reference to community standards in determining the issue of obscenity. In legal systems which still apply the *Hicklin* test, as well as in those which reject it, community standards have an acknowledged relevance; in the *Lady Chatterley* case in the Indian Supreme Court, Hidayatullah J. had a good deal to say about their relevance. In *Miller* v *California*, Burger C.J. said that the size and diversity of the United States made it impossible to speak of a single national standard; there must be a more limited or local point of reference. In that case, the court held that a Californian Court could appropriately apply a Californian standard. As Walter Gellhorn observes, this is still too large; nobody can determine the standards of an entire State like California which has more than eighteen million people, notoriously diverse in culture and life styles.[59] The difficulties of applying community standards were illustrated in a recent Australian court in the context of a prosecution of a University student paper for obscenity. The court was concerned with the relevant community standard to be applied : was it the particular University community,

58. ante note 16 at p. 36.
59. Gellhorn : *Dirty Books, Disgusting Pictures and Dreadful Laws* (1974) 8 Georgia L.R. 291 at p. 299.

or the standard of a more general community in which the University was an element, and if the latter, would the general community have a special standard for its University element? It is not surprising that there were differing answers within the court.[60]

In *Miller* v *California*, the majority in the Supreme Court ruled that the question of obscenity could be evaluated by the jury by reference to 'contemporary standards of the State of California'. Gellhorn has warned of the dangers that flow from such a standard: the threat or the actuality of law enforcement may have a 'chilling effect' on expression which may not be meretricious at all, simply because of the risk that some local official may decide to prosecute for obscenity. He instanced the case of some controversial films and plays: because local standards multiply the threat that somewhere within the country they may be found unacceptable, publishers, producers and sellers of works of writers and performers will halt well short of the line beyond which they may not step with impunity.[61] Almost exactly a year after the decision in *Miller* v *California*, the Supreme Court in *Jenkins* v *Georgia*[62] reversed a decision of a Georgia court which had held that the film 'Carnal Knowledge' was obscene. In fact this was one of the films to which Gellhorn referred; the Georgia court applied Georgia standards. Rehnquist J. speaking for the court said that *Miller* v *California* did not decide that local juries have "unbridled discretion in determining what is patently offensive... Nothing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards".[63] It is little wonder that the three judges, who had dissented in *Miller* v

60. *MacKinlay* v *Wiley*, (1971) W.A.R. 3, and see Dickey: *The Legal Concept of Obscenity in Western Australia* (1972) 10 Univ. of W.A.L.R. 223.
61. ante, note 59 at pp. 309-310.
62. (1974) 94 S.Ct. 2750.
63. at p. 2755.

California on the ground that the judicial record had revealed the impossibility of providing sufficiently certain or objective standards, made the point that the present case showed once again that all the uncertainties remained unresolved; that until at least a bare majority in the court, applying inevitably uncertain and obscure standards, have pronounced a work obscene, no one can say with any assurance what is obscene.

Some know with startling clarity what is obscene, and why that which is obscene should be suppressed, and why those who deal in obscenity should be punished. The late J. Edgar Hoover said with his customary certainty that the increase in the number of sex crimes is due precisely to sex literature, that filthy literature is the great moral wrecker and is creating criminals faster than gaols can be built. It would not have deterred him to have been informed that there is a large and very respectable body of writers which argues that there is very great doubt whether any such cause and effect can be demonstrated. In the case of obscenity it is unlikely that social science can either show harmful effects or prove that there are no harmful effects, and judgments about the appropriateness and acceptability of restraints and punishments will necessarily depend on political and philosophical considerations.[64] Some have no doubt about their capacity to define and to identify what is obscene. We have the testimony of Judge Musmanno of Pennsylvania that the word 'obscene' is clearly definable : "It is about as vague as the word cat..... I doubt that there is a newspaper reader, radio listener or television watcher, no matter how meagre is his education, who does not know the meaning of the word 'obscene' ".[65] In *Udeshi* v *State of Maharashtra*, Hidayatullah J. said: "The word 'obscenity' is really not vague

64. James Q. Wilson : *Violence, Pornography and Social Science* in The Public Interest (Winter 1971) 45 at p. 61.
65. Rao : Obscenity : Literature and the Law in *The Roots of Obscenity* ante note 22 at p. 73.

because it is a word which is well understood even if persons differ in their attitude to what is obscene and what is not."[66] What does it avail to agree on a definition of obscenity if specific applications produce such differences? *Lady Chatterley*, the star of that case, was viewed very differently in the courts of different countries. There is the added complication when, as in the case of the United Kingdom Obscene Publications Act 1959, a statutory definition of obscenity requires a balancing of obscenity against artistic merit and public good, that the uncertainty is increased. Thus the British working party which reported in 1968 concluded that it was impossible to devise a definition of obscenity that did not beg the question of a rational procedure for weighing depravity and corruption against artistic merit and the public good.[67]

The United States Commission on *Obscenity and Pornography*, which reported in 1970 after a two-year study, found that

> Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the prurient interest of the average person, is 'patently offensive' in the light of community standards and 'lacks redeeming social value'. These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its

66. A.I.R. 1965 S.C. §81.
67. *The Obscenity Laws* ante note 16 at pp. 35-36.

scope also cause interference with the communication of constitutionally protected material."[68]

The British working party reached substantially similar conclusions. It found the greatest difficulty in giving meaning to the century-old words 'deprave and corrupt'; it said that obscenity was a "phantom crime"; that the purposes and objectives of the law of obscenity were very obscure; it found the tasks assigned to juries and courts utterly unsatisfactory: juries were called upon to decide difficult questions of ethical and philosophical value, far removed from the historic jury role of fact-finding. The tasks of balancing, assigned to them under the Obscene Publications Act, 1959, were inappropriate for jury determination. As I have already said, the working party took the bold step of recommending a repeal of most obscenity laws for a trial period of five years. Time does not permit a detailed consideration of the argument, though much of it is to be found in what has been said in this lecture. There were some reservations; throughout much of the discussion of obscenity, there runs a persistent vein of argument that there should be special protection for children—whatever the empirical evidence may or may not establish, risks should not be taken unnecessarily. Another exception concerns public displays; as the British working party put it, "it is reasonable to protect individuals who may be affronted by offensive displays or behaviour in public places."[69] The Chief Justice of the United States said recently that a live display by a couple "locked in sexual embrace at high noon in Times Square" would not be constitutionally protected even if "they simultaneously engage in a valid political dialogue".[70] This gives expression to a notion of public decency and decorum, and there is a general agreement that

68. *Report of the Commission on Obscenity and Pornography* (1970) at p. 59.
69. op cit at p. 37.
70. *Paris Adult Theatre I* v *Slaton* (1973), 413 U.S. 49 at p. 67 *per* Burger, C.J.

this has an appropriate place in the contemporary law of obscenity.

In a thoughtful debate on a Ministerial statement on censorship in the Australian House of Representatives in 1971, a member referred to the recommendation of the British working party that the obscenity laws should be repealed for a trial period. He recognised that it was a serious report by a committee in a country with similar legal and social values, but said that he was confident that it was not yet acceptable in Australia. "Nothing", he said, "is so forlorn as an idea whose time has not come. I do not think the Australian public is prepared to accept such a policy with its incalculable social effect".[71] The recommendations of the British working party have not been accepted in the United Kingdom; the fact is that this remains an area of great uncertainty in public judgment. While standards have changed dramatically within a very short space of time, there is an unwillingness to take so drastic a step. Indeed this is a time at which the very excesses of change have provoked strong counter reactions: the Longford report on pornography is one piece of evidence. The decision of the Supreme Court of the United States in *Miller* v *California* shows a willingness on the part of a majority in the court to support states within a federation in their attempts and wish to impose some constraints on obscene publications, although the subsequent action of the court has made it clear that the scope for local control is substantially limited. There was an unfortunate foray by the House of Lords into this area in comparatively recent times in *Shaw* v *Director of Public Prosecutions*[72] when a majority in the House of Lords declared that the court was *custos morum*; a keeper of morality, and the court there sustained a conviction for the offence of conspiracy to corrupt public morals. This imposes another danger-

71. Cited Cowen: *From the Trial of Lady Chatterley to the Trial of Oz* in The Australian Librarian, December 1971 Supplement at p. xiii.

72. (1962) A.C. 220.

ously broad constraint upon action and publication, and I add my voice to those who condemn this doctrine as altogether inappropriate, even shocking. Moreover, there are areas into which the law should hesitate to reach; the Prime Minister of Canada expressed it epigrammatically when he said that the State has no place in peoples' bedrooms. Even this principle is not universally accepted, though the Supreme Court of the United States affirmed recently in *Stanley* v *Georgia*[73] that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting at home, what books he may read or what films he may watch."

Whether this is properly described as a principle of privacy, or as a protected area of individual autonomy, there is much to be said in support of it. The controversial issues of obscenity, as a substantial matter, arise beyond these cases, and are concerned with activities which impinge on others. There are good and powerful arguments against a law of obscenity which we have considered, and which go to the uncertainty of the concept and to the fact of great, even breath-taking, shifts in standards and values. Censors, whether they be administrative officers or judges or jurors applying obscenity laws, are in a very real sense amateurs. Prosecution itself is too often capricious and arbitrary: some matter is attacked while other matter remains untouched and there is the risk that the law may be used or be seen to be used politically, that is to say, to repress unpopular expression.

It is not conclusive of the issue that the harm done by obscene publications cannot be empirically proved. There is argument on either side of this fence, and Gellhorn reminds us that man lives by his images of reality, not by reality alone. Belief that danger exists powerfully shapes judgment, and when a legislature cannot be shown to have acted arbitrarily

73. (1969) 394 U.S. 557.

in indulging in that belief rather than another, courts must perhaps stand aside.[74] This in turn must not be taken too far; images of reality can operate as powerful constraints upon freedom of expression.

I said earlier that arguments about censorship and obscenity laws will turn not upon empirical demonstrations of harm done, but rather upon philosophical and political considerations. Some of those who have persistently argued against censorship and obscenity laws come to ask in light of the evidence of what is spewed forth in a permissive society, whether the cost in the abandonment of standards and the degradation of taste is not too high. Such questions were raised in an editorial in the *New York Times* in 1969 headed 'Beyond the (Garbage) Pale'.[75] The issues have been well stated in terms that censorship and obscenity laws in one view aim at preserving freedom through reinforcing what its proponents regard as the true values and beliefs. Opposition to censorship in the other view does not derive from hostility to the virtues that the supporters of censorship prize, but reflects rather a conviction that in the end the values of free society will be attained through freedom rather than repression. The supporters of censorship see it as a means by which to prevent debasement of the individual virtues, the cultural standards and the common security of mankind. The opponents of censorship see it, by contrast, as a danger to the freedom which fosters those virtues and standards and without which democracy cannot survive. These two quite different views must be kept in mind because their adherents sometimes too readily believe that the other side is unconcerned with values or is uninterested in freedom. Both, in fact, seek the same general ends and the question remains whether censorship will advance or retard their attainment.

74. ante note 59 at p. 303.
75. Berns: *Pornography v Democracy: A Case for Censorship*, The Public Interest (Winter 1971) at pp. 4-5.

This very clear statement by Gellhorn[76] sets out the issues very well. Certainly the operation of censorship and of obscenity laws has an impact on freedom of expression, and history, both judicial and non-judicial, reveals that the censors and the laws and their application have made serious and damaging inroads upon freedom of expression. Thoughtful men who support censorship do so in full awareness of the excesses, the dangers and the uncertainties, but support it in the belief that a rudderless and ruleless society is a far greater evil. Others would say that there is no doubt that moral standards are needed and that more virtue is required, but that they may demand the remaking of modern society rather than the tinkering of the censor. There is certainly much that is unsatisfactory in the law, but I should hesitate before giving an unqualified support to the total repeal of laws relating to obscenity.

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76. Gellhorn: *Individual Freedom and Governmental Restraints* (1956) at p. 52.

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